LIBRARY
Te Tumu Herenga
THE UNIVERSITY OF AUCKLAND

RESEARCHSPACE@AUCKLAND

http://researchspace.auckland.ac.nz

ResearchSpace@Auckland

Copyright Statement

The digital copy of this thesis is protected by the Copyright Act 1994 (New Zealand).

This thesis may be consulted by you, provided you comply with the provisions of the Act and the following conditions of use:

- Any use you make of these documents or images must be for research or private study purposes only, and you may not make them available to any other person.
- Authors control the copyright of their thesis. You will recognise the author's right to be identified as the author of this thesis, and due acknowledgement will be made to the author where appropriate.
- You will obtain the author's permission before publishing any material from their thesis.

To request permissions please use the Feedback form on our webpage.
http://researchspace.auckland.ac.nz/feedback

General copyright and disclaimer

In addition to the above conditions, authors give their consent for the digital copy of their work to be used subject to the conditions specified on the Library Thesis Consent Form.

THE CONSTITUTION OF FIJI

Muhammad Shamsud-Dean Sahu Khan LL.M.

A thesis submitted for
the degree of Doctor of
Philosophy of the University
of Auckland.

Auckland
October 1975

CONTENTS

			Page
ABSTRACT			xiv
PREFACE			xvi
TABLE OF CASES			xx
PART ONE	GENERAL INTRODUCTION		
	CHAPTER I	THE COUNTRY AND ITS PEOPLE	2
	A.	The Country	3
	B.	The People	3
		(1) The Early Fijians	4
		(2) The Early Europeans	6
		(3) The Early Indians	7
		(4) The Multiracial Society	8
	C.	The Land Problem	10
		(1) The Historical Setting	10
		(2) The Native Land Trust Board	14
	CHAPTER II	THE FIJIAN ADMINISTRATION	20
	A.	The Historical Background	21
	B.	The Colonial Policy	23
	C.	The Continuation of a Separate Fijian Administration	26
	D.	Conclusion	40

PART TWO A SURVEY OF THE HISTORY AND DEVELOPMENT OF THE CONSTITUTION

CHAPTER III VARIOUS STAGES OF HISTORICAL DEVELOPMENT

A. Introduction 43

B. Pre-Cession Constitutional History 43

C. Constitutional Development From a British Crown Colony to Representative Government 49

(1) 1874 - 1929 49

(2) 1929 - 1937 54

(a) Municipal Institutions 59

(b) The Legislature 62

(3) 1937 - 1950 68

(4) 1950 - 1965 73

(5) 1965 - 1970 89

(a) The Pre-Conference Political Scene 89

(b) Post Conference Era 95

(c) The Fijian Political Parties 97

(d) The Indian Political Parties 98

(e) The European Political Parties 99

(f) The Alliance 100

(g) The 1966 Constitution 101

(h) The 1967 Walk Out 102

(i) The 1970 Constitutional Conference 107

PART THREE THE CONSTITUTION

CHAPTER IV THE GENERAL CHARACTERISTICS AND STRUCTURE

A. Introduction 111

B. Legislature 112

(1) The House of Representatives 113

(2) The Senate 115

(3) Her Majesty 117

C. The Exercise of Legislative Functions

(1) Sessions Prorogation and Dissolution of Parliament 118

(2) Parliamentary Powers 120

(3) Parliamentary Procedure 121

(a) .Financial Measures 122

(b) Urgent and other Bills 123

(4) The Royal Assent 125

D. The Executive 125

(1) The Cabinet 126

(2) The Prime Minister 130

E. The Leader of the Opposition 131

F. The Judiciary 132

(1) General 132

(2) The Appointment and Tenure of Office of Judges 133

(3) Jurisdiction of the Courts 136

G. Service Commissions and the Public Service 137

(1) Judicial and Legal Service Commission 137

(2) Public Service Commission 138

(3) Police Service Commission 139

(4) The Electoral Commission and the Constituency Boundaries Commission 140

(5) The Commission on the Prerogative of Mercy 141

H. The Director of Public Prosecutions 141

I. The Auditor-General 142

J. Citizenship 143

(1) Acquisition of Citizenship 143

(a) By Operation of Law 143

(b) By Registration 145

(2) Termination of Citizenship 147

K. Fundamental Rights 151

PART FOUR THE PARLIAMENT AND THE COURTS IN FIJI

CHAPTER V THE EXISTENCE OF JUDICIAL REVIEW

A. Introduction 155

B. Meaning of Judicial Review 156

C. The Traditional English View 159

D. Foundations of Judicial Review of Legislation 170

(1) United States of America 170

(2) Australia 175

(3) Canada 179

(4) New Zealand 181

(5) Fiji 183

CHAPTER VI SOVEREIGNTY OF PARLIAMENT AND THE SUPREMACY OF THE CONSTITUTION

A. Introduction 187

(1) Juridical Basis of Parliamentary Sovereignty 190

(2) To What Extent can Parliament Bind Its Successor 193

B. The Position in the Commonwealth as Regards "Manner and Form" 195

C. The Position in Fiji as Regards "Manner and Form" 206

D. The Question of Sovereignty in Fiji 210

(1) General 210

(2) Legislation Must Not Infringe the Provisions of the Constitution 213

(3) Peace Order and Good Government 215

E. Conclusion 229

CHAPTER VII THE AUTHENTIC EXPRESSION OF THE WILL OF THE LEGISLATURE

A. Introduction 233

(1) The Conclusiveness of the Parliamentary Roll 234

(2) Evidence Aliunde 241

B. The Position in Fiji 248

(1) General 248

(2) Section 16 of the Parliamentary Powers and Privileges Ordinance 265

CHAPTER VIII PARLIAMENTARY PRIVILEGES AND THE COURTS

A. Introduction 275

B. The Position in England 275

C. The Basis of Privilege in Fiji 287

(1) The Position of the Colonial Legislatures Generally and Hence in Fiji 1874 - 1963 289

(2) The Position of the Legislature in Fiji, 1963 to 1970 295

(3) The Position of the Legislature in Fiji since 1970 312

CHAPTER IX THE CONSTITUTION AND INTERPRETATION

A. General Principles and the Need for Differentiation 318

B. The Interpretation of the Constitution in Practice 323

(1) The Presumption in Favour of Constitutionality

(2) The Doctrine of Severance 340

(a) General 340

(b) The Position in Fiji 345

(c) The Severability Clause 352

(3) Extrinsic Evidence 364

(a) General 364

(b) The Position in Fiji 369

C. Conclusion 383

CHAPTER X THE EFFECTS OF "UNCONSTITUTIONAL LAWS"

A. Introduction 389

B. Inconsistency 389

(1) Inconsistency of Pre-Constitution Laws 403

(2) Inconsistency of Post-Constitution Laws 409

C. Legal Consequences of Judicial Invalidation 410

(1) General 410

(2) The Position in Fiji 414

PART FIVE FUNDAMENTAL RIGHTS AND FREEDOMS

CHAPTER XI THE NEED FOR FUNDAMENTAL RIGHTS AND FREEDOMS IN FIJI, THEIR SCOPE AND APPLICATION

A. Introduction 427

B. The Need for a Constitutional Guarantee In Fiji 431

C. The Scope and Extent of Application of Fundamental Rights and Freedoms in Fiji 446

(1) General 446

(2) The Fundamental Rights and the Existing Law 450

(3) The Limits of Constitutional Guarantee 453

(a) "Reasonably Justifiable in a Democratic Society" 453

(b) Apparent Limitation under Section 15 (5) 470

(c) Derogation From Fundamental Rights Provisions during Emergencies 475

(d) Social Behaviour 483

(i) General 483

(ii) Public Function and State Involvement 487

CHAPTER XII ENFORCEMENT AND INSTITUTIONAL SAFEGUARDS OF FUNDAMENTAL RIGHTS 500

CHAPTER XIII THE ROLE OF THE JUDICIARY

A. Introduction 506

B. Rights and Remedies 507

(1) Affirmative Action 507

(2) Negative Action 513

CHAPTER XIV PROPOSED CONSTITUTIONAL COUNCIL

A. Introduction 522

B. A Constitutional Council for Fiji 528

(1) The Nature and General Function of the Constitutional Council 528

(2) The Powers and Particular Functions of the Council 531

(a) In the Legislative Process 531

(b) In the Enforcement of Fundamental Rights 539

(3) Composition of the Council 542

(4) Proceedings of the Council 545

C. Conclusion 548

CHAPTER XV PROPOSED STATUTORY ENFORCEMENTS 555

PART SIX THE WORKING OF THE CONSTITUTION

Introduction 569

CHAPTER XVI THE PLACE OF ENGLISH CONSTITUTIONAL CONVENTIONS IN FIJI

A. Introduction 572

B. The Position in Fiji 575

(1) General 575

(2) The Constitutional Functions of the Governor-General in Fiji 581

(a) Appointment 581

(b) Exercise of Functions 584

(i) General 584

(ii) The Appointment and Removal of Prime Minister 588

(iii) The Dissolution of Parliament 594

General 594

The Position as to Dissolution in Fiji 599

(iv) The Royal Assent 608

C. Conventions and Justiciability 614

(1) General 614

(2) Justification for Justiciability 616

(3) Enforceability

(4) Jurisdiction of the Courts in Fiji 626

(5) Political Issue 630

(6) The Apparent Danger of Impasse 634

D. Conclusion 635

CHAPTER XVII . THE SENATE

A. Introduction 639

B. The Need or Justification for a Second Chamber 641

(1) General 641

(2) The Position in Fiji 644

C. The Composition of the Senate 648

(1) The Present Membership 648

(2) The Problems of Systems of Membership 650

(3) The Proposed System of Membership 653

(4) The Powers and Functions of the Senate

(a) The Present 657

(b) Proposed Functions 659

(i) Free Discussions 659

(ii) Initiation of Bills 660

(iii) Proposed Joint Select Committees

(a) Sugar 662

(b) Land 662

(c) Delegated Legislation 666

(d) Public Petitions 667

(e) The Composition of the Joint Select Committees

E. Conclusion 668

CHAPTER XVIII THE SPEAKER CRISIS

A. Background to the Crisis 671

B. The Court Proceedings 674

C. Analysis and Constitutional Implications of the crisis and the Judicial decision thereon 682

(1) General 682

(2) Avoidance of Constitutional Issues 687

(3) Judicial Reasoning 691

D. Conclusion 698

PART SEVEN THE FUTURE

CHAPTER XIX CONCLUDING OBSERVATIONS

A. The Communal Question 702

B. Towards a New Electoral Equilibrium 704

(1) The Number of Seats 706

(2) The National Appeal 706

(3) Referendum 707

C. The Land Issue 708

D. The Judiciary 709

E. The Westminster Model 713

APPENDIX I Extra-Territorial Legislation and The Statute of Westminster 716

APPENDIX II Attorney-General of Antigua v Antigua Times Ltd. 730

ABSTRACT

The Constitution of Fiji though similar to many others adopted within the Commonwealth since the end of the Second World War departs in many respects from the Constitution of the United Kingdom and that of New Zealand. The Constitution of the United Kingdom is wholly unwritten and that of New Zealand is only partly written as contained in the Constitution Act of 1852. Fiji not only has a written Constitution; the Constitution also incorporates the rules or principles which are accepted as constitutional conventions in the United Kingdom and New Zealand. In this thesis attention has been given to the position of the Governor-General as the representative of the Queen and the powers conferred upon him. The fact that he is a local appointee makes his position even more delicate. The problem is accentuated in that the exercise of some of his powers are made nonjusticiable by the Constitution.

It is also suggested in this work that the fact that the Constitution of Fiji has an entirely different basis from that of the United Kingdom or New Zealand renders many of the principles adopted in those countries inapplicable. The notion of parliamentary sovereignty propounded by Dicey and others does not apply. The Constitution, not Parliament, is supreme. Judicial review of legislation is inevitable and the courts are intended as guardians of the Constitution. There are other important differences many of which are the result of the political decisions made on behalf of the three main races in Fiji before the Constitution was drafted. The separate Fijian administration and the powers of the Council of Chiefs are illustrations of these provisions. The fact the indigenous Fijians enjoy a privileged position through

the separate Fijian Administration and the Council of Chiefs is discussed.

The system of representation in the House of Representatives with a combination of the communal and multiracial electorates provides an unusual, perhaps questionable, experiment towards a solution of the tensions and problems associated with a heterogeneous society. Likewise the fundamental rights provisions have special significance in a multi-racial society like that of Fiji. As a background to the above matters a comprehensive survey of the constitutional history of the country is attempted.

The role of the judiciary has been given significant emphasis throughout the thesis as it is felt that the judiciary is the linchpin of the Constitution of Fiji.

Concluding observations have been offered on ways of making the spirit of the Constitution, as enshrined in the preamble to the Constitution, a reality; and to engender a national outlook amongst the people of all ethnic groups.

PREFACE

Fiji became an independent Dominion within the British Commonwealth on 10 October 1970. There has not been any study dealing with the Constitution of the Dominion. I present this thesis on the Constitution of Fiji in recognition of the importance of that demand and as a small service which I could render my country. It is hoped that students of government as well as of law will derive assistance from it.

My intention was to deal with the Constitution as a whole. The impracticability of providing detailed studies of all aspects of the Constitution in a work of this size manifested itself at the outset. Whilst conceding, for instance, that Chapter II of the Constitution dealing with fundamental rights and freedoms merits a thesis in itself, I have nonetheless been forced to adopt a more general approach, detailing only those facets which I felt to be essential to the framework and operation of the Constitution. At the same time I have found it necessary to delve into matters which may ex facie seem unrelated or unwarranted but on closer examination it will be seen that their understanding is a pre-requisite to a fuller appreciation of the constitutional provisions. The composition, history and tensions of Fiji's multiracial society, the land issue and the separate Fijian Administration are cases in point.

Independence was sought and granted on the basis of a compromise reached between the country's two main political parties. Hence it is important to remember that the transition to independence was by agreement and not complicated by the

communal factors which are endemic in any multiracial society. Nonetheless the problems associated with a heterogeneous society remain. The fundamental rights provisions of the Constitution provide inadequate protection in view of the fact that such provisions basically affect public bodies and governmental agencies and not the private actions of individuals. Communalism is further exacerbated by the system of parliamentary representation. In an attempt to obviate appeals to communal sentiments and to build a national outlook amongst the diverse ethnic groups, I have made several proposals including that of a new electoral equilibrium.

As the guardian of the Constitution, the judiciary has a vital role to play. If the new order established by the Fiji Constitution is to be given the maximum effect, the Courts will have to discharge their function with independence and integrity. Because the judiciary is the linchpin of the Constitution of Fiji, I have emphasised its role throughout this thesis. I have found the approach of the Supreme Courts of the United States and India of great assistance. This is particularly so in the area relating to the fundamental rights and freedoms and the interpretation of the Constitution. The Supreme Court of the United States, in particular, has proved its independence and strength. There is much to be gained from its decisions and from its experience of almost two centuries in the field of judicial review of legislation. This will be of particular relevance to Fiji as the Courts in Fiji have the unenviable, but vital, task of adjusting to the new order. It will have to reject the English traditions where judicial review of legislation is a foreign concept.

The final chapter is headed "Concluding Observations" rather than "General Conclusions". This has been done because the

sheer variety of subjects that have been discussed do not lend themselves to the latter and yet something approaching the former is clearly warranted. Nevertheless, wherever necessary, conclusions are given in particular sections of the study.

In this thesis I have attempted to deal with constitutional issues, eschewing politics as far as possible. At times the boundary may be blurred. I have endeavoured to approach the work with an objective and open mind. In places where my views may perhaps have been stated rather strongly, I hope and believe that it was done objectively with a view to making constructive criticism. Where the reference to personalities by name was unavoidable, I disclaim any desire or intention on my part to be other than purely informative.

After this dissertation was completed and it was about to go to the Bindery, the Privy Council delivered its very recent decision in Attorney-General v Antigua Times[1] (reported on 19 August 1975) dealing with issues upon which I had already made my observations and came to my own conclusions. Happily there seems to be little conflict, if any, between the views expressed in this thesis and those of the Privy Council. In view of its importance, I include a discussion of the decision as Appendix II.

I am indebted to the New Zealand University Grants Committee for the New Zealand Government Fellowship without which this work would not have been possible.

---

1 [1975] 3 ALL E.R. 81.

But for the inspiration, guidance and encouragement of Professor J.F. Northey, Dean of the Faculty of Law, this work would not have been undertaken or completed. It is my privilege to acknowledge the debt I owe to my supervisors - Professor J. F. Northey, who sacrificed much of his few leisure hours to enable me to complete this thesis in the minimum time, and Dr F.M. Auburn, Senior Lecturer in Law for his much needed assistance.

To Miss Julia McMahon, Librarian of the Davis Law Library at Auckland and all her assistants, my special thanks for the assistance rendered during my research, particularly with regard to inter-loan applications. I am very grateful to Miss Gracie M. Fong and Miss Eily M. Lawton for undertaking the very boring and onerous task of proof-reading.

Special tributes are due to my wife, Zohra, for her unstinted support during the preparation of this work and to my father, A.H. Sahu Khan, who held fort for me in our legal practice during my absence from Fiji.

To all who have helped I record my sincere thanks. For any shortcomings or errors I alone am responsible. I have endeavoured to state the law as at 30 September, 1975. To facilitate easy reference I have included a copy of the Constitution in the pocket of the back cover.

Auckland
30 September 1975

M. S. Sahu Khan

TABLE OF CASES

Abdul Khader v State of Mysore (1953) S.C.R. 355	408
Adegbenro v Akintola [1963] A.C. 151	577, 578, 580, 604, 616, 632, 634, 696, 700
Adkins v Children's Hospital of the District of Columbia 261 U.S. 525 (1922)	368, 464, 468
Agbaje v Commissioner of Police of Western State (1969) 1 Nigerian Monthly Law Rep. 137	481, 506
Akar v Attorney-General for Sierra Leone [1970] A.C. 853	213, 215, 261, 263, 371
Akoto, Re. (unreported)	447
Alabama Power Co. v Ickes 302 U.S. 464 (1937)	402
Allen v Louisiana 103 U.S. 80 (1880)	348
Allis v Billings 6 Metc., Mass. 415, 39 Am. Dec. 744	415
Amalgamated Food Employees Union v Logan Valley Plaza 391 U.S. 308 (1968)	488
Armstrong v The State of Victoria (No. 2) (1957) 99 C.L.R. 28	379
Ashbury v Ellis [1893] A.C. 339	722
Ashby v White (1703) 2 Ld. Raym. 938	282, 283, 285, 512
Ashwander v Tennessee Valley Authority 297 U.S. 288 (1936)	687
Assam Railway and Trading Co. v Commissioner of Inland Revenue [1935] A.C. 445	365
Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B. 223	619
Athlumney, Re. [1898] 2 Q.B. 551	404
Attorney-General v Colonial Sugar Refining Co. Ltd. [1914] A.C. 237	320
Attorney-General v De Keyser's Royal Hotel Ltd. [1920] A.C. 508	600, 601
Attorney-General for Alberta v Attorney-General for Canada [1939] A.C. 117	382
Attorney-General for Alberta v Attorney-General for Canada [1947] A.C. 503	362
Attorney-General for Antigua v Antigua Times Ltd. [1975] 3 All E.R. 81	731
Attorney-General for British Columbia v McDonald Murphy Timber Co. [1930] A.C. 357	379
Attorney-General for Canada v Attorney-General for Ontario [1937] A.C. 326	178
Attorney-General for Canada v Attorney-General for Ontario [1937] A.C. 355	179
Attorney-General for Canada v Cain and Gilhula [1906] A.C. 542	723
Attorney-General for New South Wales v Brewery Employees' Union (1908) 6 C.L.R. 469	320
Attorney-General for New South Wales v Homebush Flour Mills Ltd. (1936-37) 56 C.L.R. 390	379
Attorney-General for New South Wales v Trethowan [1932] A.C. 526	167, 200, 209, 625

Attorney-General for Nova Scotia v Legislative Council of Nova Scotia [1928] A.C. 107	625
Attorney-General for Ontario v Attorney-General for Canada [1912] A.C. 571	180, 320
Attorney-General for Ontario v Reciprocal Insurance Co. [1924] A.C. 328	377
Attorney-General for the Province of Prince Edward Island v Attorney-General for Canada [1905] A.C. 37	625
Attorney-General for Victoria v The Commonwealth (1945) 71 C.L.R. 237	327
Australian Apple and Pear Marketing Board v Ton King (1941) 66 C.L.R. 77	176
Australian Communist Party v The Commonwealth (1950-1951) 83 C.L.R. 1	176, 177, 368, 377
Australian National Airways v The Commonwealth (1945) 71 C.L.R. 29	177, 345
Australian Textiles Pty. Ltd. v The Commonwealth (1945) 71 C.L.R. 161	380, 382
Australian Woollen Mills v The Commonwealth (1949) 69 C.L.R. 476	399
Awolowo v Federal Minister of Internal Affairs [1962] All N.L.R. 177	460
Bain Peanut Co. of Texas v Pinson 282 U.S. 499 (1931)	322, 385
Baker v Carr 368 U.S. 186 (1962)	617, 626
Balewa v Doherty [1963] W.L.R. 949	270, 371, 397, 712
Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1	369, 398
Barton v Taylor (1866) 11 App. Cas. 197	292, 295
Barrows v Jackson 364 U.S. 249 (1953)	491
Beaumont v Barnett (1836) 1 Moo. P.C. 59	290
Belfast Corporation v O.D. Cars Ltd. [1960] N.I. 60	321, 324
Bell v Maryland 378 U.S. 226 (1964)	491
Benyon v Evelyn (1664) Tr. 14 Cas. 2	282
Berea College v Kentucky 211 U.S. 45 (1908)	342, 362
Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics 403 U.S. 388 (1971)	508
Block v Hirsh 256 U.S. 135 (1921)	382
Bloodgett v Holden 275 U.S. 142 (1927)	174
Bloxham v Favre (1883) 9 P.D. 101	719
Board of Education v Barnette 319 U.S. 624 (1943)	445
Borden's Farm Products v Baldwin 293 U.S. 194 (1934)	367
Bowes v Broadhead (1649) Style 155	245
Boyd v United States 116 U.S. 616 (1885)	517, 519
Bracey v Read [1963] Ch. 88	227
Brazee v Michigan 241 U.S. 340 (1916)	351
Breen v Snedden (1961) 106 C.L.R. 406	377
Bribery Commissioner v Ranasinghe [1964] A.C. 172	181, 201, 203, 204, 209, 241, 248, 255, 360, 386, 693

Bridges v California 314 U.S. 252 (1941) 337
Brinegar v United States 338 U.S. 160 (1949) 335
British Coal Corporation v The King [1935] A.C. 500 322, 384
British Columbia Electric Railway Co. v The King [1946] A.C. 527 221, 222, 223
British Railway Board v Pickin [1974] A.C. 765 167, 190, 235, 237, 242, 254
Broken Hill South Ltd. v Commissioner of Taxation (1936-1937) 56 C.L.R. 337 177, 728
Brown v Board of Education 347 U.S. 483 (1954) 172, 468
Brown v Pennsylvania 391 U.S. 921 (1968) 489
Bruce v Commonwealth Trade Marks (1904) 4 C.L.R. 1569 177
Bunting v Oregon 243 U.S. 426 (1917) 368
Burdett v Abbott (1811) 14 East 1 284
Burton v Wilmington Parking Authority 365 U.S. 715 (1961) 492

Cahill's Case (unreported) 302, 307, 308
Campbell, ex parte, Re Catchart (1870) L.R. 5 Ch. App. 703 228
Cantwell v Connecticut 310 U.S. 296 (1940) 335
Carmichael v Southern Coal and Coke Co. 301 U.S. 495 (1936) 340, 353
Caroline W. Dobbins v City of Los Angeles 195 U.S. 223 (1904) 367
Carter v Carter Coal Co. 298 U.S. 238 (1936) 172, 341, 342,353
Chalmers v Pardoe [1963] 3 All E.R. 552 16
Champlin Refining Co. v Corporation Commission 286 U.S. 210 (1932) 354
Chandler v Director of Public Prosecutions [1964] A.C. 763
Chastleton Corporation v Sinclair 264 U.S. 543 (1924) 368, 380, 382
Chenard and Co. v Joachim Arissol [1949] A.C. 127 223
Cheranci v Cheranci [1960] N.R.N.L.R. 24 457, 462, 464, 467
Chesebro v Los Angeles County Flood Control District 306 U.S. 459 (1938) 390
Chicago Board of Trade v Olsen 262 U.S. 1 (1923) 349, 350, 353
Chicot County Drainage District v Baxter State Bank 308 U.S. 371 (1940) 411
Chike Obi v Director of Public Prosecutions [1961] 1 All N.L.R. 186 457, 506
Chiranjit Lal v Union of India (1950) S.C.R. 869 328
Chubb v Salomons (1851) 3 Car. and Kir 75 266, 268
Citizens Savings and Loan Association v Topeka (1874) 20 Wall, 655 445
Clayton v Heffron (1960) 105 C.L.R. 214 624
Cole v Young 351 U.S. 536 (1956) 174
Colegrove v Green 328 U.S. 549 (1946) 503

Commissioner of Customs and Excise v Cure and Deeley Ltd. [1962] 1 Q.B. 340 620
Commonwealth v Bank of New South Wales [1950] A.C. 235 179
Cox v Army Council [1963] A.C. 48 721
Cormack v Cope [1974] 48 A.L.J.R. 319 653, 658
Croft v Dunphy [1933] A.C. 156 219, 223, 228, 725, 726, 729
Crouch v The Commonwealth (1948) 77 C.L.R. 339 683
Croswell v Benson 285 U.S. 22 (1922) 366, 687

Davis v Mann 377 U.S. 678 (1964) 626
De Keyser's Royal Hotel Ltd. v The King [1919] 2 Ch. 197 601
D'Emden v Pedder (1904) 1 C.L.R. 91 343
Dennis v United States 341 U.S. 494 335
Deputy Federal Commissioner of Taxation (N.S.W.) v W.R. Morgan Pty Ltd. (1939) 61 C.L.R. 735 365, 378
Dill v Murphy (1864) 1 Moo P.C. N.S. 487 290
Dorchy v Kansas 264 U.S. 286 (1924) 341, 354
Doyle v Falconer (1866) L.R. 1 P.C. 328 292, 293
Dred Scott v Sanford 19 Howard 393 (1857) 172
Drummond Wren, Re. [1945] 4 D.L.R. 674 495
Dwarkadas v Sholapur Spinning Co. (1954) S.C.R. 132 683

Earl of Shrewsbury v Scott (1859) 6 C.B.N.S. 1 236
Earl Russell, Trial of [1901] A.C. 446 719
Eastman Photographic Materials Co. v Comptroller-General of Patents, Designs and Trade Marks [1898] A.C. 571 364
Edinburgh and Dalkeith Railway v Wauchope (1842) 1 Bell's App. Cas. 252 159, 235, 240, 243, 254
Edwards v Attorney-General for Canada [1930] A.C. 124 322, 384, 385
Ekundare v Governor in Council [1961] All N.L.R. 159 460
El Paso and North Eastern Railway Co. v Gutierrez 215 U.S. 87 (1909) 341
Electric Development Co. of Ontario v Attorney-General [1911] 1 K.B. 410
Eliot's Case (1629) 3 St. Tr. 332 282
Elliott v The Commonwealth (1935-1936) 54 C.L.R. 657 177
Eshugkayi Eleko v The Officer Administering the Government of Nigeria [1931] A.C. 662 434
Euclid v Ambler Realty Co. 272 U.S. 365 (1926) 503
Evans v Abney 396 U.S. 435 (1970) 489, 491
Evans v Browne 30 Ind. 514 (1869) 250
Evans v Newton 382 U.S. 296 (1966) 489, 491
Express Newspaper v Union of India (1959) S.C.R. 12 401

Fairbanks v United States 181 U.S. 283 (1901)	327
Farey v Burvett (1916) 21 C.L.R. 433	723
Federated etc. Service Association v New South Wales Railway Traffic Employees' Association (1906) 4 C.L.R. 488	343
Fenton v Hampton (1858) 11 Moo. P.C. 347	292, 293
Field v Clark 143 U.S. 649 (1891)	240
Fisher v Raven [1964] A.C. 210	227
Fletcher v Peck 6 Cr. 87 (1809)	326
Forkes v Samuel [1913] 3 K.B. 706	269
Fort Francis Pulp and Power Co. Ltd. v Manitoba Free Press Co. Ltd. [1923] A.C. 695	381
Fowler v Pierce 2 Cal. 165 (1852)	250
Francis v Chief of Police [1973] A.C. 761	454
Fraser and Henleins Pty Ltd. v Cody (1945) 70 C.L.R. 100	345
Frost v Corporation Commission 278 U.S. 515 (1928)	342
Gallagher v Lynn [1937] A.C. 863	400, 402
Gallant v The King [1949] 2 D.L.R. 425	240, 612, 614
Girard College Trusteeship, Re., 357 U.S. (1958)	489
Gopalan v State of Madras A.I.R. (1950) S.C. 88	267, 371, 397
Great Eastern Railways Co. v Goldsmid (1884) 9 A.C. 927	246, 247
Great Northern Railway Co. v Sunburst Oil and Refining Co. 287 U.S. 358 (1932)	414
Greaver v Tofield (1880) 14 Ch.D. 563	227
Griffin v Illinois 351 U.S. 12 (1955)	422
Guaranty Trust Co. v Hannay [1915] 2 K.B. 536	682
Guinn v United States 238 U.S. 347 (1915)	348
Guru Datt v State of Behar (1961) S.C. 1684	406
Hadacheck v Sebastian 239 U.S. 394 (1915)	368
Hague v Committee for Industrial Organisation 307 U.S. 496 (1939)	335, 337
Hammersmith Borough Council v Boundary Commission (Unreported) (1954)	189
Hammerstein v British Columbia Coast Vegetable Marketing Board [1962] 37 D.L.R. (2d) 153	179
Harding v Federal Commission of Taxations (1917) 23 C.L.R. 119	327
Harnam Singh v Bawa Singh (1957) 6 F.L.R. 31	16
Harris v Donges [1952] T.L.R. 1245	181, 187, 196, 197, 198, 209, 212, 240, 247, 258, 625
Har Shefi v Har Shefi [1953] p.161	624.
Hepburn v Griswold 8 Wall (U.S.) 603 (1869)	367
High Lands Farms Dairy v Agnew 300 U.S. 608 (1937)	353
Hill v Wallace 259 U.S. 44 (1922)	349, 350, 353

Hoani Te Heuheu Tukina v Aotea District Maori Land Board [1941] A.C. 308 159, 190, 236
Hollinshead v Hazelton [1916] 1 A.C. 428 364
Hoover and Allison Co. v Evatt 324 U.S. 652 (1945) 366
Horner v Graves (1831) 7 Bing. 735 496
Hughes and Vale Pty. Ltd. v The State of New South Wales (No. 2) (1955) 93 C.L.R. 127 368
Hume v Higgins (1949) 78 C.L.R. 116 380
Hunt v Van Alstyne (1841) 25 Wend. 605 246, 251

Ibralebbe v R [1964] A.C. 900 187, 215, 225
Institute of Patents Agents v Lockwood [1894] A.C. 347 189
Irving v Nichimura (1907) 5 C.L.R. 233 178
Ives Investment Ltd. v High [1967] 2 Q.B. 379 227

James v United States 366 U.S. 213 (1961) 414
James Everards Breweries v Day 255 U.S. 545 (1924) 368
Jay v Topham (1684) 12 St. Tr. 822 282
Jenkins v The Commonwealth (1947) 74 C.L.R. 400 369
Jones v Director of Public Prosecutions [1962] A.C. 635 332, 333
Jones v Opelika 319 U.S. 103 (1943) 337
Jones v Randall (1774) 1 Cowp. 17 244
Judiciary and Navigation Acts, Re, (1929) 29 C.L.R. 257 177
Julius v Lord Bishop of Oxford (1880) 5 App. Cas. 214 621
Jumuna Coal Mine No Liability v The Victorian Coal Miners' Association (1908) 6 C.L.R. 309 322
Jumman Sai v Harry Atchson (1960) 7 F.L.R. 71 16

Kalibia Owners v Wilson (1910) 11 C.L.R. 689 178, 327, 331
Katikiro of Buganda v Attorney-General [1961] 1 W.L.R. 119 625
Kielley v Carson (1842) 4 Moo. P.C. 63 289, 290, 291, 292, 300, 697
King v Barger (1906) 6 C.L.R. 40 190, 398
King v Countess of Arundel (1616) Hobart 109 239, 242, 244, 245, 247, 253
King v The Governor of the State of South Australia (1907) 4 C.L.R. 1497
King Emperor v Benoari Lal Sarma [1945] A.C. 14 320
Klaebe's Case (Unreported) 304, 307
Knowles Ltd. v Rand [1962] 1 W.L.R. 893 227
Kochanni v State of Madras A.I.R. (1959) S.C. 725 267
Kovacs v Cooper 336 U.S. 77 335, 337
Kuppan v Unni (1956) 4 F.L.R. 188 16
Kuruma v The Queen [1955] A.C. 197 516

Labrador Coy. v The Queen [1893] A.C. 104	159, 236
Lachmandas v State of Bombay (1952) S.C. 235	407
Landers v Woodworth (1878) 2 S.C.R. 158	294
Lee v Bude and Torrington Junction Railway (1871) L.R. 6 C.P. 577	159, 189, 190, 236
Legal Tender Cases 12 Wall (U.S.) 457 (1870)	367
Lemke v Farmers Grain Co. 258 U.S. 50 (1922)	352
Life and Casualty Ins. Co. v McCray 291 U.S. 566 (1933)	326
Lilavati v State of Bombay A.I.R. (1957) S.C. 521	268
Linkletter v Walker 381 U.S. 618 (1965)	414, 419, 420
Liversidge v Anderson [1942] A.C. 206	189, 432, 460
Lochner v New York 198 U.S. 45	372
Loeb v Columbia 179 U.S. 472 (1900)	342, 362
Louden v Ryder [1953] Ch. 423	
Lovell v Griffin 303 U.S. 444 (1938)	335
MacLeod v Attorney-General for New South Wales [1891] A.C. 455	717, 718, 719, 720, 721, 722, 723, 724, 725, 726
Macmanaway and the House of Commons Clergy Disqualification Act, 1801, Re, [1951] A.C. 161	286
MacCormick v Lord Advocate [1953] S.C. 396	189
Madhavan v Falvey (unreported)	259, 300, 674, 685, 690, 691, 695, 696, 697, 698, 699
Madras (State of) v Row (1952) S.C.R. 597	466, 551
Mahendra v State of Uttar Pradesh (1963) S.C. 1019	406, 410
Mapp v Ohio 367 U.S. 643 (1961)	414, 508, 515, 516, 519
Marbury v Madison 1 Cranch 137	170, 174, 184, 185, 187
Marsh v Alabama 326 U.S. 501 (1945)	488, 494
Martin v Struthers 319 U.S. 141 (1942)	322
Massachusettes v Mellon 262 U.S. 447 (1932)	502, 683
Mazurek v Farmers Mutual Fire Ins. Co. 320 Pa. 33; 181 Atl. 570 (1935)	356
Middleton v Anderson (1842) 4 D. 957	159
Middleton v Texas Power Co. 249 U.S. 152 (1919)	327
McCauley v The King [1920] A.C. 691	199, 204, 205, 209, 360
McCulloch v Maryland 4 Wheat. (U.S.) 316 (1819)	367
McDonald v Cain [1953] V.L.R. 411	249, 626, 627
Moose Lodge No. 107 v Irvis 407 U.S. 163 (1972)	498
Mortensen v Peters (1906) 14 S.L.T. 227	159, 189
Muller v Oregon 208 U.S. 412 (1908)	368
Munn v People of Illinois 94 U.S. 113 (1875)	463
Myers v United States 272 U.S. 52 (1926)	502

Nakkuda Ali v Jayaratne [1951] A.C. 66 621
Nashville, Chattanooga and St. Louis v Walters 294 U.S. 405 380
National Life Insurance Co. v United States 277 U.S. 308 (1928) 353
National Union of General and Municipal Workers v Gillian (1946) I.K.B. 81 189
New Castle and Hunter River Steamship Co. Ltd. v Attorney-General of the Commonwealth (1921) 29 C.L.R. 357 178
New Jersey Steam Navigation Co. v Merchant's Bank of Boston 47 U.S. 344 (1848) 494
New York Central and H.R.R. Co. v U.S. 212 U.S. 481 (1909) 348
Ngwenya v Deputy Prime Minister (1973) (unreported) 391-397, 399
Ningkan, Stephen Kalong v Tun Abeng Haji Openg (1966) 2 M.L.J. 187 630, 631, 632, 634
Noble and Wolfe v Alley 1951 1 D.L.R. 321 495
Norton v Shelby County 118 U.S. 425 (1886) 411
Norwood v Harrison 413 U.S. 455 (1973) 497

Ogden v Saunders 12 Wheat 213 (1827) 326
Ohio Bell Telephone Co. v Public Utilities Commission 301 U.S. 292 (1936) 374
Olawoyin v Attorney-General [1961] 1 All N.L.R. 269 501, 502, 684
Olcott v Supervisors 834 U.S. 382 (1872) 494
Osborne v The Commonwealth (1911) 12 C.L.R. 321 190

Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997 621
Pangborn v Young 32 N.J.L. 29 250
Parliamentary Privilege Act 1770, Re, [1958] A.C. 331 286
Patel v Attorney-General for Zambia (1968) (unported) 457, 458, 459 467
Peanut Board v Rockhampton Harbour Board (1933) 48 C.L.R. 266 377
P.S. Bus Co. Ltd. v Members and Secretary of Ceylon Transport Board (1958) 61 New Law Reports (Ceylon) 257, 263
Penin v United States 232 U.S. 478 380
Pennsylvania v Board of Trusts 353 U.S. 230 (1957) 489
People v Cahn 282 P.2d. 905 (1955) 518
Peterson v Greensville 373 U.S. 244 (1963) 487, 491
Pillai v Mudanayake [1953] A.C. 514 530
Plessy v Ferguson 163 U.S. 537 (1896) 468
Poindexter v Greenhow 114 U.S. 270 (1885) 342

Pollock v Farmers Loan and Trust Co. 157 U.S. 429 (1895) rehearing 158 U.S. 601 (1895) 340, 352, 363
Powell v Pennsylvania 127 U.S. 678 (1887) 463
Public Utilities Commission v Pollak 343 U.S. 451 (1951) 489
Pylkington's Case (1450) Y.B. 33 Hen 6 238

Queen v Richards; Exparte Fitzpatrick and Browne (1955) 92 C.L.R. 157 302

R v Burah (1878) 3 A.C. 889 190, 216, 319, 613, 725
R v Christian (1924) A.D. 101 187
R v Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow and Co. (1910) 11 C.L.R. 1 344, 347, 363
R v Debruiel (1861) 11 Cox C.C. 207 721
R v Drybones (1967) 64 D.L.R. (2d) 260
R v Fineberg [1968] N.Z.L.R. 119 182, 219, 221, 222, 223, 224, 225, 229
R v Hampden (1637) 3 St. Tr. 825
R v Hodge (1884) 9 A.C. 117 190, 725
R v Lander [1919] 38 N.Z.L.R. 405 717
R v Mohammed Hanif (unreported) 517
R v Morgentaler (No. 1)(1974) 42 D.L.R. (3d) 424 181
R v Ndobe [1930] S.A.L.R. 484 257, 263
R v Paty (1704) 2 Ld. Raym. 1105 282, 283, 285
R v Poole, ex parte Henry (No. 2) (1939) 61 C.L.R. 634 345
R v Public Vehicles Appeal Tribunal (1964) 113 C.L.R. 209 323
R v Smith [1962] 2 Q.B. 317 721
R v University of Sydney; ex parte Drummond (1943) 67 C.L.R. 95 382
Railroad Retirement Board v Alton R.R. 295 U.S. 238 (1936) 352, 354, 356
Ramlingham v Ram Krishna Mission (1962) 8 F.L.R. 12 (S.C.), 9 F.L.R. 95 (C.A.) 16
Ranasinghe v The Bribery Commission (1962) 64 New Law Reports 449 264
Reade v Smith [1959] N.Z.L.R. 996 620, 622
Reference Under Art 143 of the Constitution; A. (1965) S.C. 745 315
Registrar of Restrictive Trade Agreements v W.H. Smith Ltd. [1968] 1 W.L.R. 1541 227
Reil v The Queen (1884) 10 A.C. 675 216, 223, 725
Reynolds v Sims 377 U.S. 533 (1964) 626
Ritchie v Richards 14 Utah 345 (1896) 250
Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd. [1921] A.C. 438 617

Saghir Ahmad v State of U.P. (1954) S.C.R. 1218	337
Said v New York 334 U.S. 558 (1948)	335, 337
Schneiberman v United States 320 U.S. 118 (1942)	322
Schneider v Smith 390 U.S. 17 (1968)	174
Schnek v United States 249 U.S. 49 (1919)	454
Securities and Exchange Commission v Electric Board and Share Co. 18 F. Supp. 131 (S.D.N.Y. 1937)	351
Semple v O'Donovan (1917) 19 G.L.R. 137	723
Sharma v Krishna Sinha A. (1959) S.C. 395	315
Shell Co. of Australia Ltd. v Federal Commissioner of Taxation [1931] A.C. 275	327
Shelly v Kraemer 334 U.S. 1 (1948)	490
Sheriff of Middlesex Case (1840) 11 A. & E. 273	284, 285, 286, 299, 302
Ship "North" v The King 37 S.C.R. 385	724
Sickerdick v Ashton (1918) 25 C.L.R. 506	723
Simpson v Attorney-General [1955] N.Z.L.R. 271	601, 610, 628, 629
Sloan v Pollard (1948) 75 C.L.R. 445	369
Smith v Texas 233 U.S. 630 (1914)	368
Sonzinsky v United States 300 U.S. 506 (1937)	348
South Australia v The Commonwealth (1942) 65 C.L.R. 367	177, 382, 410, 416, 623
Speiser v Randell 357 U.S. 513 (1958)	455
State v Jones 6 Wash. 452 (1863)	250
Stenhouse v Coleman (1944) 69 C.L.R. 457	369
Strettler v O'Hara 243 U.S. 629 (1917)	368
Stewart Dry Goods Co. v Lewis 294 U.S. 550 (1934)	390
Stockdale v Hansard (1839) 9 A. & E. 1	285, 299, 302
Swift v United States 105 U.S. 691 (1882)	326
Taylor v Attorney-General of Queensland (1917) 23 C.L.R. 457	624
Terminiello v Chicago 337 U.S. 1 (1949)	337
Terry v Adams 345 U.S. 461 (1952)	489
Thomas v Collins 323 U.S. 516 (1944)	336, 337, 339
Thornhill v State of Alabama 310 U.S. 88 (1939)	400
Tonkin v Brand [1962] W.A.R. 2	627
Toohey v Melville (1892) 13 L.R. (N.S.W.) 132	292, 294
Trial of Lord Melville (1806) 29 St. Tr. (Ihowell)	269
Trop v Drilles 356 U.S. 86 (1958)	175
Trustees, Executors and Agency Co. v Federal Commissioner of Taxation (1933) 49 C.L.R. 200	217, 218, 223, 224
United Fuel Gas Co. v Railroad Commission of Kentucky 278 U.S. 300 (1928)	367
United Public Workers of America v Mitchell 330 U.S. 75 (1947)	683
United States v Alger 152 U.S. 384 (1893)	327
United States v Appalachian Electric Power Co. 311 U.S. 377	689
United States v Ballen 144 U.S. 1 (1891)	246
United States v Butler 297 U.S. 1 (1936)	175

United States v Carolene Products Co. 304 U.S. 144 (1938) 266, 380, 463
United States v Congress of Industrial Organisation 335 U.S. 106 (1948) 687, 688, 689
United States v Reese 92 U.S. 214 (1875) 342, 348, 363
United States v Rumley 345 U.S. 41 (1952) 689, 690
Utah Power and Light Co. v Pfost 286 U.S. 115 (1952) 348

Vacher and Sons Ltd. v London Society of Compositors [1913] A.C. 107 320, 623
Validation of $150,000 Serial Funding Bonds of Clarke County 187 Miss. 512, 193 SO. 449 415
Victoria v The Commonwealth (1942) 66 C.L.R. 488 399
Viscountess Rhonddas' Claim, Re, [1922] 2 A.C. 339 364

Wason v Walter (1868-1869) L.R. 4 Q.B. 73 280
Waterford Railway Co. v Logan (1850) 14 Q.B.D. 672 235
Waterside Workers Federation v Commonwealth Steamship Owner's Association (1920) 28 C.L.R. 209 327
Watts v Indiana 338 U.S. 49 (1949) 366
Weaver v Palmer Bros 270 U.S. 402 (1925) 367
Webb v Outrim [1907] A.C. 81 228, 320
Webster v Hastings 56 Nebr. 669 (1898) 250
Weeks v United States 232 383 (1914) 515, 517
Weller v New York 268 U.S. 319 (1925) 351
Wellington Cooks' and Stewards Union etc., Re, (1906-1907) 9 G.L.R. 214 723
West Coast Hospital v Parrish 300 U.S. 379 (1936) 464, 469
West Virginian State Board of Education v Barnette 319 U.S. 624 (1943) 337, 338
Whitney v California 274 U.S. 357 (1926) 454
Williams v Majekodunmi [1962] 1 All N.R. 413 476, 478, 479, 480, 506
Williams v Standard Oil Co. 278 U.S. 235 (1929) 340, 354, 356
Williams and Williams, Re, [1961] O.R. 657, 29 D.L.R. (2d) 107 (C.A.) 181
Willis v Perry (1912) 13 C.L.R. 592 292, 294
Woolworths (N.Z.) Ltd. v Wynne [1952] N.Z.L.R. 496 726, 727

Yates v United States 354 U.S. 298 (1957) 174
Yick Wo v Hopkins 118 U.S. 356 (1886) 367

Zorach v Clauson 343 U.S. 306 (1952) 366

PART ONE

GENERAL INTRODUCTION

CHAPTER I

THE COUNTRY AND ITS PEOPLE

A. The Country

The Dominion of Fiji is situated in the Southern Pacific Ocean between latitude 15° 42' and 20° 02' south, and between longitude 178° 12' west and 176° 53' east, the 180th meridian passing through Fiji.

The Fiji archipelago comprises about 320 islands[1] of varying sizes of which only about a hundred are inhabited. The larger islands are of volcanic origin and are mountainous. The two main islands are Viti Levu (4,010 square miles) and Vanua Levu (2,138 square miles) and together they comprise an area of 6148 square miles out of the total land area of 7,055 square miles.

B. The People

The society in Fiji is heterogeneous. The population includes Indians, Fijians, Europeans, part Europeans, Chinese and other Pacific Island races.[2] The prominent role, however, in the economic, political and constitutional fields has been played by the Indians, Fijians and the Europeans (including part Europeans).

---

1 About 800 including all the islets.

2 Census of the population have been taken decenially (with one exception) since 1881, the last being in September 1966. The 1956 and 1966 Census revealed the following figures (with the official estimated figures for 1974 shown in brackets for comparison purposes): Fiji Current Economic Statistics, Jan. 1975.

	1956	1966	Estimated 1974
Fijians	148,134	202,176	(245,000)
Indians	169,403	240,960	(284,000)
Europeans	6,402	6,590	(3,000)
Part Europeans	7,810	9,687	(10,000)
Polynesians)	5,320	6,095)	(14,000)
Melanesians)		)	
Micronesians)		)	
Rotumans	4,422	5,797	(4,000)
Chinese	4,155	5,149	
Others	91	273	

(1) The Early Fijians

There are divergent views as to the historical and geographical origins of the Fijians.[3] There are no written records of the early days prior to the arrival of the Europeans although some information can be gleaned from the system of reciting genealogies which were passed on from one generation to the next.[4] These songs relate to the coming of the Fijian from a country in the far - west under the leadership of ancestral gods whose canoe, the "Kaunitoni" was driven ashore on the west coast of Viti Levu at or near the site of the Veiseisei village.[5] From this point the "travellers" are said to have dispersed - some explored the hinterland whilst others set out on further voyages of discovery and searched other islands within the Fiji group. In time there sprang up small villages with each village having little, if anything, to do with the others and gradually the south west, south east, and northern areas of Viti Levu became well settled.

These movements eventually led to the establishment of a number of powerful confederacies. The first two were those of Verata and Rewa in the south east of Viti Levu. The next was that of Bau, comprising those who had fled from their original homes in the hills as the result of wars. They initially settled on the mainland but later moved onto the island of Bau itself. To the east of Viti Levu a confederation comprising the whole of the Lau Group was formed. This latter grouping was to become considerably powerful through Tongan influence which was also instrumental in the formation of the important confederacies of Somosomo and Vuna on the island of Taveuni.[6] Other

---

3 See Sir Alan Burns, Fiji (1963), 25; and J. W. Burton, The Fiji of Today (1910), 39.

4 J. J. McHugh, The Colony of Fiji (1929), 4 et seq.

5 About 7 miles north of Nadi.

6 Which is on the south east of Vanua Levu.

major confederacies were those of Nadroga[7] in the south-west of Viti Levu, Macuata,[8] Lakeba[9] and Naduri.[10] In addition there were several inter-tribal amalgamations amongst tribes living outside the spheres of influence of the larger confederacies. The many semi-independent communities in the interior areas also combined under a common leader during war.

By the nineteenth century, it was evident that the Fijians were consolidated into various distinct tribes. The Fijians led a communal way of life with the Chief as the head of the community. As in Africa and other countries, tribal wars and conflicts were common. It was due to these that the more powerful tribes were able to extend their boundaries and the size of their tribes. Casualties in these interminable tribal wars were not very heavy owing to the conventions, which regulated fighting and the relative ineffectiveness of the weapons which at this stage consisted of bows and arrows, slings, spears and clubs.

With the arrival of Europeans[11] and the introduction of firearms tribal warfare was intensified. Indeed it was with European help that Bau was able to conquer Verata and to subject virtually all the tribes of the eastern and northern coasts of Viti Levu and thus become the premier state. Somosomo conquered Vuna in 1840 and successfully allied with Bau against Natewa thus making itself a very powerful state in Vanua Levu. Rewa was initially a close ally of Bau but they fell out when Rewa destroyed the village of Suva which was

---

7 Pronounced Nandronga.

8 Pronounced Mathuata.

9 Pronounced Lakemba.

10 Pronounced Nanduri.

11 See p. 6 , post, for the coming of the Europeans.

under Bau's protection. The ensuring war lasted some eleven years. By 1852 Bau, with the help of King George of Tonga, had established itself as the most powerful state in Fiji and its ruler, Seru Cakobau,[12] came to be regarded by foreign consuls as the King of Fiji.

Tonga, a small group of islands lying just east of Fiji, played a disproportionately large influence on the Pacific area generally, as well as in Fiji itself. This was especially noticeable in the Lau confederacy with the advent of Maafu who was of royal Tongan blood. Maafu consolidated his power and was on the verge of a major confrontation with Bau in 1858 when the first British Consul arrived in the country. The Consul succeeded in preventing the attack but with his departure at the end of the year Maafu prepared fresh plans for the conquest of Bau. Cakobau had, however, made Fiji a British Protectorate in 1858 and so when the British Consul returned he warned Maafu that any attack on Bau would be regarded as an attack on Great Britain. Maafu subsequently signed a deed repudiating all claims to chiefly power in Fiji and Cakobau's position was thence unchallenged, and by 1871 he was generally recognised as the King of Fiji.

(2) The Early Europeans

As far as is known the first outsider to come to Fiji was Abel Tasman in 1643. Captain Cook was next in 1774 and he was followed by Captain Bligh in 1789. These visits were at best sporadic and accidental. By 1820 however, Fiji was being regularly visited as a provisioning port for whaling vessels and for its sandalwood which was then in great demand.

The first Europeans to settle in Fiji were merchants and missionaries. About 1830 a number of European traders settled at Levuka on the island of Ovalau and by 1835 had established a

12 Pronounced Thakumbau.

trading settlement there. When Fiji became a British Colony, Levuka became its first capital. The first party of missionaries to arrive was a group of methodists led by Cross and Cargill and they settled at Lakeba in the Lau Group in 1835.

As has been said above, with the coming of the Europeans, modern weapons were introduced. The Europeans began to participate in tribal wars. Various chiefs tried to get the upper hand over others by "trading" with Europeans for guns and other goods. Many hundreds of acres were "given away" in these "trading" practices. British, American and French warships also began to visit Fiji. The Captains of these warships began to impress on the Fijians that savagery and fighting were not favourably looked upon by their respective governments.

Eventually, the European traders began to come in greater numbers. Hence Fiji became a trading centre for them particularly in respect of sandalwood, whales and later cotton.

(3) The Early Indians

The Indians came to Fiji principally as indentured labourers. The first group of Indians comprising four hundred and ninety eight indentured labourers arrived from Calcutta on 14 May 1879. Hitherto, the plantations of cotton and coconuts had been run with labour from nearby island groups but new regulations made it difficult to recruit that labour. The next choice was to employ Fijian labourers but this was thwarted by the first British Governor of Fiji, Sir Arthur Gordon, who refused to allow it. He showed concern for the adverse effects such recruitment would have on the Fijian way of life. He saw that such a course would disrupt the Fijian family and the structure of the traditional village economy and authority system, particularly because the recruits would have had to live in labour camps. The concern of

the Government for the Fijians arose from the pledge given at the time of the Deed of Cession to look after Fijian interests.

The Fiji Government took the initiative in looking for an alternative supply of labour. Eventually negotiations were completed with the Government of India. The agreement provided that Indian labourers were to be brought to Fiji for five years of compulsory work as the Fiji Government directed. After this period they were free to go back to India but at their own expense. However, if they stayed for another term of five years the Fiji Government would pay their return passages, and those of their children.

In 1880, a year after the arrival of the first Indians, the Colonial Sugar Refining Company of Sydney extended its sugar operations to Fiji. This turned out to be a profitable venture and accelerated further Indian migration. After 1916 when the indentured labour system was abolished, it was found that the majority of the Indians who came under this scheme preferred to settle in Fiji.[13]

(4) The Multiracial Society

Fiji became a British Crown Colony on 10 October 1874. By then Fiji already had significant numbers of Europeans besides the Fijians. With the arrival of the Indians after 1879 Fiji became a truly heterogeneous society from the very early days of colonial rule. Communalism subsequently played a prominent role in the constitutional and political development of the Colony. The economic developments also proceeded on communal basis.

---

13 A total of 60,537 Indians arrived in Fiji under the indenture system; of these 24,655 were repatriated under the indenture contract. The rest settled in the Colony: K. L. Gillion, "The Source of Indian Emigration to Fiji," Population Studies, (1956) Vol. X, No. 2, 139. For a fuller account of the early Indian migration and subsequent settlements in Fiji see Adrian C. Mayer, Peasants in the Pacific (2nd ed., 1973).

Immediately after Cession, the economy of the Colony was controlled by the Europeans. Practically all the industrial and commercial enterprises - particularly those involving sugar and coconut products - were the monopoly of the Europeans. With education and political participation the Indians began to compete with the Europeans. However, the Fijians were not able to compete as the Indians could. Today, the major industries are sugar, coconut products, banana, gold and tourism. The Europeans and the Indians play greater roles than the Fijians in most of these fields. The most important industries in economic terms are sugar and tourism. The Indians produce the bulk of the sugar cane. The tourist industry is basically in the hands of the Europeans and to a lesser extent the Indians. The Fijians play a relatively minor role in the control of the tourist industry. The great majority of those in the professions are Indians and Europeans. There are some Fijians in the professions but they are relatively few.[14] The commercial spheres are virtually controlled by the Europeans and the Indians.

This lagging on the part of the Fijians is a serious problem and all possible avenues are being explored to assist the Fijians in all aspects of the economic and educational field. For instance, the Fiji Development Bank has recently announced that the Fijians would be given loans on very easy terms to assist them in setting up any business or profession.[15] Even in the civil service the government is following the principle of parity between the Indians

---

14 E.g. there are some eighty lawyers in Fiji and of them only seven are Fijians. Of these one is a judge of the Supreme Court, one a magistrate, one the Acting Crown Solicitor and four only are in private practice.

15 Fiji Times, 8 April 1975.

and the Fijians.

C. The Land Problem

Land is a very important, if not the vital, factor in Fiji today. The majority of the population[16] in Fiji is Indian and most of them rely on the land for their livelihood. Nevertheless, eighty three per cent of all the land is in the hands of the Fijians.[17] Hence the land problem has become both a political and communal one in Fiji particularly between the Indians and Fijians. It was for this reason that the land issue has played a very prominent role in the political and constitutional development of Fiji.[18] Accordingly it is important to consider, albeit briefly, the land tenure in Fiji and how so much land remains in Fijian hands.

(1) The Historical Setting

Before Fiji became a British Crown Colony in 1874, European settlers had acquired large areas of land from the Fijians. Land had been acquired by various means, some by bona fide "trading" and some by malpractices. The Deed of Cession recognised three classes of land, namely, freehold, crown land and native land. Paragraph 4 of the Deed reads as follows:-

> THAT the absolute proprietorship of all lands not shown to be now alienated so as to have become bona fide the property of Europeans or other foreigners or not now in the actual use or occupation of some chief or tribe or not actually required for the probable future support and maintenance of some chief or tribe shall be and is hereby declared to be vested in Her Majesty, her heirs and successors.

---

16 See n. 2, p.3 , ante.

17 Although some part of these lands are leased to the Indians.

18 See pp. 14 et seq., post.

Immediately after Cession a Lands Titles Commission was set up in 1875 for the claimants of land to substantiate their claims. The Commission took some seven years to finish its enquiries and presented its report to the Governor in Council in February 1882. It was found that 414,615 acres of land had been "properly" alienated to the Europeans.[19] Crown grants were issued in respect of such land. There were some 30,000 acres which were not claimed by the Fijians and this was held by the Crown. The whole of the balance of the land in Fiji, amounting to some 3,900,000 acres, remained the property of the Fijian land-holdings units.[20]

In 1875 all further dealings of native land between the Fijians and others were prohibited.[21] In 1880 the Native Lands Ordinance was enacted after its draft provisions had been discussed and examined by the Fijian Council of Chiefs.[22] Under this Ordinance the Native Lands Commission was established to make enquiries and to ascertain what lands in each province[23] were the rightful property of Fijian owners and in what manner and by which social units the lands were held. The Fijian land owning units actively participated in the enquiries. There were special procedures prescribed for the sittings of the Commission.[24]

---

19 The total area of the Colony is 4,581,500 acres. There were many claims which were rejected. For a full report of the Lands Titles Commission see Fiji Royal Gazette (1883) 75.

20 It is questionable how 83 per cent of the land remained native land. Clause 4 of the Deed of Cession provides that these lands which were "in the actual use or occupation ... or actually required for the probable future support and maintenance of some chief or tribe" were to be native lands. As far as the writer is aware this Clause 4 had not been subject to any judicial decision or scrutiny by other authority.

21 The Native Lands Transfer Prohibition Ordinance 1875.

22 As to the Council of Chiefs see p.25 , post.

23 As to the Provinces see p. 23 , post.

24 The procedure was similar to that provided for by the current Native Lands Ordinance 1905, Chap. 114 of the Laws of Fiji.

The Commission sat over a very long period of time. It ascertained the social units owning land. The boundaries of their lands had been described and copies in English deposited with the Registrar of Titles. All the principal social units have been granted parcels of land which they claimed. A register of all Fijian lands has been drawn up and kept at each provincial head-quarters.

The 1880 Ordinance was repealed by the Native Lands Ordinance of 1905 which is the current statute empowering the Governor-General to appoint a Native Lands Commission should the need arise in case of disputes arising, inter alia, in respect of native lands.[25]

Sir Arthur Gordon, the first substantive Governor of Fiji, followed the principle of preserving the traditional social units of the Fijian people. However, in the early twentieth century a change of view appeared on the part of the Europeans and succeeding Governors. A move was made to encourage the principles of individualism. In 1905 legislation was passed which authorized sale or lease of native land to non-Fijians with the consent of the Governor in Council.[26] From 1905 to 1909 about 20, 184 acres of native land were purchased by the settlers, bringing the total land area held on freehold title up to 434, 799 acres.[27]

The relaxed policy of dealings with native land brought vigorous protests from Lord Stanmore (previously Sir Arthur Gordon) in 1908. He brought the matter up in the House of Lords. The argument for

---

25 A Commission was also set up in the twenties. The Native Lands Commission also determines disputes as to headship of social units and also membership of social units and other matters incidental thereto; Native Lands Ordinance 1905, ss 16 - 21.

26 Native Lands Ordinance 1905, s. 4.

27 The Colony of Fiji 1874 — 1929, (Government Printer, Fiji, 1929), 55.

the relaxed policy was that the so called "waste lands" were available for lease or sale by the Crown. The Secretary of State for the Colonies made an examination of all the circumstances and ruled that the[28] "waste lands of Fiji must continue to be regarded as the property of the natives as much as the occupied lands". Consequently, subsequent to 1909 no further sales of native land were permitted[29] and the Native Lands Amendment Ordinance of 1912 prohibited alienation of native lands by native owners, whether by sale, exchange or grant, except to the Crown.[30]

Difficulty was frequently experienced in obtaining renewals of lease of native land. The native owners of the land frequently declined on trivial grounds to agree to any renewal. In order to provide a greater security of tenure, the Native Lands (Leases) Ordinance was enacted in 1916. This Ordinance provided that in the event of the native owners declining to surrender control of the land the subject of a lease about to expire, and no valid reason being advanced for such refusal, the Governor in Council could decide the value of the permanent and unexhausted improvements on the property and require the native owners of the land to pay the assessed amount within a stipulated period, or in the alternative, to agree to the surrender of control of the land to the government for approval of a renewal of the expired lease.[31]

Subsequent to 1912, although the question of leasing of native land had been subjected to legislation, at no time has the question of

---

28 Parliamentary Paper, H. L. 205, 1908, 77.

29 The Colony of Fiji, op. cit., 55.

30 S. 3

31 Native Lands (Leases) Ordinance 1916, s. 4.

allowing the native land to be sold ever again been the subject of a legislation. Hence today although native land can be leased, no freehold title may be acquired in respect of such land.

(2) The Native Land Trust Board

The native lands are not held by the Fijians individually but communally.[32] Prior to 1940 the system of leasing Fijian land was by application made by the prospective lessee to the social unit[33] owning the land and all leases were subject to the approval of the government. This was found to be unsatisfactory. The whole question was examined by the Governor, Sir Arthur Richards, in the thirties. It was then referred to the Council of Chiefs. The Council of Chiefs made its recommendation for the creation of a statutory body to administer all native lands. A large majority of the Provincial Councils[34] supported this recommendation. Consequently, in 1940 the Native Land Trust Ordinance[35] was passed. Under it the Native Land Trust Board was established with the Governor as the President.[36] The control of all native land is vested in this Board and all such land is administered by the Board for the benefit of the Fijian owners.[37]

A major policy of the Native Land Trust Ordinance was to ascertain and demarcate the areas of Fijian-owned land which should

---

32 See p. 21 , post.

33 As to these social units, see p. 21 , post.

34 As to Council of Chiefs and Provincial Councils, see pp. 23 et seq., post.

35 Chap. 115 of the Laws of Fiji.

36 The composition of the Board has been such that all along the Fijians had the ultimate control of the Board. As to the present composition of the Board see p. 636 , post.

37 Native Land Trust Ordinance, s. 4.

be set aside in perpetuity for the use and maintenance of the various proprietary units. Hence a Commission, headed by Ratu Sir Lala Sukuna, was appointed in 1940 to investigate and demarcate lands for such purposes. The Commission carried out such investigations and under its statutory powers given by the 1940 Ordinance, the Native Land Trust Board has made such demarcations and is continuing to do so. The demarcated areas are known as the "native reserves". The lands falling within the native reserves are not available for use in any manner whatsoever by non Fijians. They can only be leased or given on licence to a Fijian.[38] Even if such lands are lying idle (which is the case today) they cannot be given for use by non Fijians. If such land is leased to a Fijian, he cannot transfer or sublet the land to a non-Fijian. Similarly, such a land cannot be dealt with by a process of law which will have the effect of it being taken over by a non-Fijian.

As a result of the Native Land Trust Ordinance except in two cases,[39] no native land (whether falling within the native reserve or not) can be dealt with either by way of lease, sub-lease, mortgage, transfer, assignment or in any manner whatsoever without the consent of the Native Land Trust Board first had and obtained.[40] The granting or withholding of consent is in the absolute discretion of the Board.[41]

---

38 Ibid., s. 16.

39 First, in respect of the land comprised in a lease granted for a term of 999 years (which are very few in any event) ibid., s. 36; and secondly a lessee of a residential or commercial lease granted before 29 September 1948 may mortgage the same; ibid., s. 12.

40 Ibid., s. 12.

41 Idem.

Any dealing taking place without such consent is unlawful and even a court of equity will not intervene to grant relief.[42]

Another prominent feature of the Native Land Trust Ordinance is section 9 which provides:

> No native land shall be dealt with by way of lease or licence under the provisions of this Ordinance, unless the Board is satisfied that the land proposed to be made the subject of such licence or lease is not being beneficially occupied by the Fijian owners, and is not likely during the currency of such lease or licence to be required by the Fijian owners for their use, maintenance or support.

The enactment of the Native Land Trust Ordinance created much uncertainty and anxiety amongst the Indians as they were the ones who felt the direct adverse effects. Many Indian sugar cane farmers were evicted from the land that had been cultivated by them for two or three generations. Rehabilitation committees were appointed but they were not able to settle the evictees or dispossessed Indian farmers as satisfactorily as the assurances that had been given by the colonial government at the time of the enactment of the 1940 Ordinance.[43] The result was that those farmers who tilled the land were almost

---

42 Chalmers v Pardoe [1963] 3 ALL E.R. 552. See also Kuppan v Unni (1956) 4 F.L.R. 188, Ramlingham v Ram Krishna Mission (1962) 8 F.L.R. 12 and 9 F.L.R. 95. Jumman Sai v Harry Atchson (1960) 7 F.L.R. 71 and Harnam Singh v Bawa Singh (1957) 6 F.L.R. 31.

43 The Director of Lands said in 1940,

> When the [Native Land Trust] Board decides that renewal of a lease ... be refused ... and that the land should be returned to the native owners for their own use, I would recommend that, wherever possible, such lease should be extended for a short period ... in order that the lessee may ... seek another plot of land on which he may settle .... The average period of such extension might well be five years. Further, every endeavour should be made to assist such lessee in finding other land .... It goes without saying that a cultivator, if he is to be of any use to the community, must be kept on the land. Legislative Council Debates (1940) 99.

literally thrown on the streets. Great numbers of Indian farmers fell into this category. Relatively small numbers of these evictees were resettled in "new" lands with very little governmental aid. Some of them, on their own initiative, settled on other fresh lands and, with their own capital and resources, developed them. Some of these lands were fourth class lands fringing the hillsides of the country. Others, who had no means of becoming future farmers, became casual labourers. Some evictees had no alternative but to settle again on other native lands right in the interior. Such farmers opened up new lands and made them cultivable in spite of the fact that they faced further eviction on the expiry of the lease in respect of that land. In short, the plight of the evicted farmers was very desperate.

As time passed security of tenure became a serious question. This was not only in respect of native lands but also freehold lands. To solve part of the problem an important step was taken in 1966.

In 1966 the Agricultural (Landlord and Tenant) Ordinance[44] was passed. The fundamental purpose of this Ordinance was to[45]

> destroy a pernicious system that we have at the moment in Fiji. This system in relation to tenures of agricultural land is that, at the present moment, we have short tenancies, low rents and little, if any, security for the tenants. The result of this system means that there is little, if any, encouragement to develop agricultural land, because it is quite clear that the incentive in relation to the tenant is nothing but bad. He bleeds the land white in relation to his short term of tenancy, he can obtain little if any, compensation for his term, and with the exception of buildings on stilts, he cannot remove the buildings from the land. He cannot remove the buildings which form part of the agricultural tenancy in question.

On the question of security of tenure, the Ordinance[46] provides for

---

44 Chap. 242 of the Laws of Fiji.

45 Legislative Council Debates (1966), 475, per the Attorney-General.

46 Ss. 4 - 13. Although the statute permits a minimum period of 10 years, invariably only 10 years' extensions are granted.

a statutory extension of an agricultural lease for two terms of ten years each if the tenant can show greater hardship than the landlord. There is a Tribunal established under the Ordinance which decides the relative hardships. If the relative hardship of a tenant is greater the Tribunal grants the first extension of ten years. If on the expiry of this first extension the relative hardship of the tenant is still greater then the second statutory extension of lease is granted for another period of ten years.

There are also provisions relating to increasing rents and forfeiture of lease which operate in favour of the landlord.[47]

The provisions of the 1966 Ordinance have been circumvented by the landlords, particularly the Native Land Trust Board. Previously the Native Land Trust Board usually granted lease for thirty years. After 1966 it granted leases for only ten years on the basis that the tenant may be allowed two statutory extensions of ten years each.

The Native Land Trust Board, which has at least eighty three per cent of all the lands in Fiji under its control, is obviously the largest landlord in Fiji. The great majority of the tenants who are affected by non-renewal of leases are Indian. [Also the Indians are the majority of the population in Fiji,[48] and most of them rely on land for their livelihood. Accordingly, the question of land inevitably became a racial, political and constitutional issue in Fiji. In the Constitution itself, along with Fijian custom and customary rights, the Fijian land has been given an entrenched position.[49]]

In the Fijian society the question of land is interwoven with the

---

47 Ss. 23 & 26.

48 See n. 2, p. 3 , ante.

49 Constitution, ss. 67 and 68.

question of custom and customary rights. They cannot be seen in isolation. Traditionally the Fijians do not hold land individually but communally and this manner of land holding dates back to pre-Cession days. The British Government recognised that the Fijians had their own tribal and traditional ways of living and owning land; and it undertook to govern the Fijians "in accordance with native usages and customs".[50] In fulfilment of this promise, a separate Fijian Administration was set up from the very early days of the British Colonial rule. This separate Fijian Administration played (and continues to play) a prominent role in the constitutional and political development of the country.[51] So much so that the entrenched position of the Fijian land, custom and customary rights are the product of the significance of the separate Fijian Administration. Accordingly it is intended to deal with the subject of Fijian Administration in order to facilitate the understanding of the entrenchment of the special safeguards of Fijian land, custom and customary rights, and section 45 (1) a, 67 and 68 of the Constitution.

---

50 Parliamentary Paper: H. L. 205, 1908, 84.

51 However, it has been revealed that the separate Fijian administration and the communal land holding have been significant factors in the retarding of the economic and general progress of the Fijians. E. g. see Report of the Commission of Enquiry into the Natural Resources and Population Trends of the Colony of Fiji (1959); Council Paper No. 1 of 1960 (Commonly known as the Burns Commission Report); and The Fijian People: The Economic Problems and Prospects, a report by Professor O. H. K. Spate: Council Paper No. 13 of 1959.

CHAPTER II

THE FIJIAN ADMINISTRATION

The Fijian Administration is a rural local government system having jurisdiction over all Fijians in the Dominion. However, the principles of the system were not an innovation of the British Colonial rule but were found in indigenous institutions. Such institutions were merely given statutory recognition after Cession. In order that the principles involved in the Fijian Administration may be understood it is desirable to explain briefly the constitution and evolution of Fijian society up to the stage which had been reached at the time of Cession.

A The Historical Background [1]

In its earliest form the Fijian society comprised independent family groups who were tillers of the soil. Each group had its own village and land for planting; and was ruled by the senior male members. Except in the case of Macuata (pronounced Mathuatha) succession was agnatic. This original village settlement was known as a Yavutu, and the original founder was termed the Kalouvu.

As the primitive settlement increased it gradually evolved into various separate units of population known as Matagali (pronounced Matanggali and meaning "community"). Each such unit was headed by a son of Kalouvu. Similarly, the first family of sons in each Matagali formed smaller subdivisions known variously as Itokatoka, Mbito, or Mbatinilovo according to the locality. The various Matagalis grouped together to form the Yavusa (or "federation") under one chief who was the nearest lineal descendant of the common ancestor, or Kalouvu. The senior male in each Matagali represented his community in the Yavusa. The Yavusa was in effect a political entity with sovereign rights over a defined area.

---

1 See Report of the Public Service Reorganization Committee: Council Paper No. 2 of 1937 from which significant assistance has been derived.

When the country came to be more closely populated, inter-tribal fighting became common. Hence confederations of several Yavusa were formed for mutual protection under a selected chief. Such a confederation was known as Vanua (or "Confederation"). Further confederations of several Vanua united under a powerful chief to form a Matanitu[2] (or "state"). However many Vanua remained separate and independent. Matanitu was the largest social unit known in the Fijian polity.

Succession to the headship of a family or tribe customarily passed to surviving brothers in order of seniority, and on the death of the last brother reverted to the senior male in the succeeding generation; that is, to the eldest son of the eldest brother if there was one. In a Yavusa, a Vanua, or a Matanitu succession to the headship, while preferring the recognized order of seniority, was frequently decided by a system of election to ensure the selection of the best man for so important a position.

This was basically the position of the Fijian society at the time of Cession. In short, the British colonial rule found the Fijian society was strictly communal. The formation and aggregation of these social units gave rise to the system of Chiefs amongst the Fijians and which has since become deeply embedded in Fijian society and its way of life. As Mr G.K. Roth so aptly put it:[3]

> Throughout Fijian society customary rights and obligations existed and their practice as between chiefs and people in the

---

2 Cases in point being MBau, Rewa, Namosi, MBua, Cakaudrove (pronounced Thakaundrove), Naitasiri, Serua, Lau Nadroga (pronounced Nandroga) and Kadavu (pronounced Kandavu).

3 G.K. Roth, Fijian Way of Life (1953), 67. Substantial assistance has been derived from this work.

> various social units, great and small, was well understood. Members of these units acknowledged, as being in the best interests of the State to which they belonged, the obligation to render tribute and service to their chiefs for the general weal. Rights they did not press, being sufficiently protected through the social system under which they lived. Commands to produce tribute such as bark-cloth or sail mats, and services such as the planting of food crops, were a natural feature of the every-day life of chiefs and people.... In return for the loyalty of his people and as a result of the services that he could command, the chief afforded his people protection against attack; and he was expected to help them in times of distress, to settle land disputes and domestic affairs if major interests were involved, and generally to administer his people in accordance with accepted custom.

B. The Colonial Policy

Traditions and customs were so strong amongst the Fijians that at the time of the cession of the Colony to Great Britain, the British Government gave the undertaking that the Fijians would be governed "in accordance with native usages and customs". It was to implement such a policy that the first provisional Governor of Fiji, Sir Hercules Robinson, adopted a policy of administering the Colony on principles found in indigenous institutions. In a despatch dated 16 October, 1874, Sir Hercules stated in a report on the establishment of the Native Department:[4]

> By this machinery it is believed that arrangements can be made for the efficient government of the Natives without departing in any important particular from their own official customs, traditions and boundaries.

In pursuance of this policy he grouped the islands of the Colony into Provinces, based on the boundaries of the old "States". Within each Province a number of Divisions was created. Each Division comprised a group of villages. A native Fijian was placed in charge

---

4 Cited in Legislative Council Debates (1944), 32.

of each of these units - Provinces, Divisions and Villages.

There was also a chain of responsibility from the lowest to the highest level. At the head of every Province was a chief known as a Roko who was the deputy of the Governor in his own Province. There were also formed Provincial and Divisional courts with Fijian magistrates having jurisdiction over matters where only Fijian parties were affected. These structures were the foundations for a Fijian local government system.

The first substantive Governor of Fiji, Sir Arthur Gordon (who later became Lord Stanmore) perpetuated the basic policies of Sir Hercules Robinson. In 1876 the Native Affairs Regulations Ordinance[5] was passed and under it the Native Regulation Board was created. The fundamental duty of the Board was to -

> consider such questions relating to the good government and well-being of the Native populations as shall from time to time be submitted to them by the Governor and to give honest and well-advised counsel thereupon and to submit to the Governor such recommendations and proposals as they may deem to be for the benefit of the Native population....[6]

The Board also had powers to make regulations with regard to native marriages, divorces and succession to property and generally for the "good government and well-being of the native population".[7] There were also native courts created with native magistrates having jurisdiction over matters involving only the Native population. This Ordinance and the regulations made thereunder constituted the first written code of Fijian custom.

The regulations secured the continuance of certain moral and customary sanctions found in the traditional Fijian social

---

5 39 and 40 Vict. No. 35.

6 Ibid., s. 7.

7 Ibid., ss. 8 and 9.

> system and provided a simple code of criminal and civil law adaptable to situations arising in the Fijian way of life.[8]

The first set of regulations covered practically all aspects necessary for the administration of the native Fijians. They covered such fields as the appointment of Fijian officials and their general responsibilities in the administration of their own affairs in the various Provinces, administration of justice in Fijian courts, raising and collecting of rates for administrative expenses, discipline, registration of births and deaths, schooling, and other social and economic matters generally.

Prior to Cession there was in existence a system of government by Councils of Chiefs and elders. They used to meet and deliberate on matters relating to "custom, alliances, discipline, and the many feuds that attended on their natural form of government in those days."[9] Statutory recognition was given to that system. There were three types of councils which were recognised - the Divisional Councils, the Provincial Councils and the Council of Chiefs. Each Divisional Council was presided over by the head of the Division called Mbuli. This Council dealt with local matters of welfare and good order and was responsible to the Roko Tui who was the head of the Province. The Provincial Councils which had corresponding but wider duties dealt with matters relating to the Province as a whole and was responsible to the Governor. Both these Councils had legislative authority. The third was the Council of Chiefs which was comprised as its name suggested, basically of Chiefs. This body was merely an advisory one. Its membership has always included representatives from all Provinces. Although it was merely an advisory body, the Council of Chiefs' recommendations and views

---

8 Roth, op. cit., 136.

9 Ibid., 137.

have always been regarded as representative of Fijian feeling generally. As will be seen, even today it is the "voice" of the Fijians. This Council has always been consulted by the Governors in all measures affecting the Fijians. One instance was the passing of the Native Lands Ordinance in 1880, when Sir Arthur Gordon was Governor.

C. The Continuation of a Separate Fijian Administration

The desirability of continuing a separate Native Department drew the attention of the Colonial Government in 1913. By a despatch dated 24 September, 1913 the Secretary of State issued the following instructions to the Governor of Fiji:[10]

> I shall be glad if you will consider, with the advice of the Executive Council, whether the continued separate existence of the Native Department is necessary or desirable. It has occurred to me that it may be possible to distribute the work which is now attended to by the Native Department amongst the first grade Stipendiary Magistrates and the Stipendiary Magistrates and Commissioners (who already are, or should be,in close touch with native affairs in their own districts) affording them such extra assistance as they may require from the savings which would be effected by the abolition or reduction of the Native Department.

As a result a Committee was appointed to investigate the matter and on 5 January 1914 it reported, inter alia, that:[11]

> The Committee concur in the suggestion of the Secretary of State that fuller powers should be delegated to Stipendiary Magistrates and that native administration in the provinces should be placed in the hands of those officers, who will in future be styled District Commissioners. But, it is, in

---

10 Journal of the Legislative Council (1915); Council Paper No. 101, 7.

11 Ibid., 9.

> the opinion of the Committee, essential that the desired end should be attained gradually.

However, the Committee did recommend that:[12]

> The Committee consider that it is quite impossible to do away with the Native Department at the present time. Such a sudden change would inevitably lead to misunderstanding and confusion.

This suggestion of decentralization was opposed by the Fijians. They felt that this separate administration, particularly through the separate and distinct Department, was in their best interests. On 2 February 1915 the Roko Tuis of Tailevu, Cakaudrove and Mbua addressed a letter of protest to the Governor stating:[13]

> We wish to bring to Your Excellency's notice that it is our desire and that of the chiefs and people of Fiji that neither the Department nor the Commissioner should cease to exist.
>
> We Fijians are the most numerous class in the country and own the greater part of the land. We support all Government measures and are loyal subjects of His Majesty. We do not think it at all reasonable that we should be considered as of no account or that our department should be belittled ....
>
> We feel sure that were the Department to be abolished we should not receive the same consideration as we now do .... We beg that our Department be maintained.

However, the process of decentralization did commence in 1915, albeit, gradually. In 1915 the Legislative Council passed a motion[14] which had the object in principle of abolishing the Native Department

---

12 Idem.

13 Ibid., 14.

14 Legislative Council Debates (1915), 205.

and replacing it with certain officers who were to be attached to the Colonial Secretary's Department. The head of the Native Department (previously the Native Commissioner) became the Secretary for Native Affairs and the Assistant Commissioner became the Assistant Secretary for Native Affairs. Control of the Native Administration was placed in the hands of District Commissioners and Officers later called District Officers, who were in fact assistants to the District Commissioners.

Up to 1916 there was a Native Department. In 1917 that separate Department was abolished. The Secretariat for Native Affairs then became part of the Colonial Secretary's Department. In 1923 there was another change, when the Secretariat for Native Affairs became known as the Native Section of the Secretariat and the head of that Section was known as the Under-Secretary for Native Affairs. In 1925 the post of Secretary for Native Affairs was restored but it was still attached to the Colonial Secretary's Department. By 1937 decentralization of the Native Administration had taken place in all but one of the Provinces.[15]

The Fijians did not approve of the decentralization. As the late Ratu Sir Lala Sukuna pointed out,[16] there were

> doubts and misgivings on the part of the Fijians who regretfully looked back to the time when they did govern themselves through the natural agency of Chiefs and elders.

Their greatest complaint was that,[17]

> The policy of the period was, on the passing of the old school of Chiefs, to govern through European officers

---

15 Legislative Council Debates (1944), 35.

16 Idem.

17 Idem.

rather than through young Chiefs who had not been trained in the art of leadership.

In 1936 a Committee called the Public Service Reorganization Committee was appointed by the Governor to review, inter alia, the existing organization of the Public Service in Fiji. In 1937 the Committee presented its Report to the effect that the [18]

> Natives are now showing a desire not only to disregard their natural and chiefly organization, but also to disregard the authority of the administrative officers and to seek an outlet in a Department whose centre is far from their tribal homes. The effect can only be harmful to the Natives, disruptive to their life, and disruptive also to proper administration of their affairs.

The Committee recommended the abolition of the Department[19] and title of Secretary for Native Affairs and favoured the creation of a post of Adviser on Native Affairs who was to be an ex-officio member of the Executive Council and a nominated member of the Legislative Council. The Committee was careful in saying that this newly defined post should not involve any departure from the unitary system.[20] Basically the Adviser was to be the Governor's adviser on matters

---

18 Journal of the Legislative Council (1937): Council Paper No. 2, at 7.

19 The term "Department" was a misnomer. At the time of the report there was no separate entity known as the "Native Affairs Department". There were two subsections in the Colonial Secretary's Department, one was called the "Native Section" and the other the "Indian Section". It was only loosely that the former was called the "Native Affairs Department". Hence the effect of the recommendation of the Committee was that the "Native Section of the Secretariat should be more closely associated with the general work of that office and that any separatist tendencies should be severely checked.": The Governor's Address, Legislative Council Debates, (1938), 4.

20 Journal of the Legislative Council (1937): Council Paper No. 2, at 7. As to the details of the duties and functions of this Adviser see idem.

connected with Native policy and administration. He was to be the chief link between the Government and the Fijians. The ultimate aim of the recommendations was that the separate section of the Colonial Secretary's Office dealing with Native Affairs would be completely absorbed in the larger organization.[21] The changes as recommended by the Committee did eventuate and in 1938 the Adviser on Native Affairs was appointed.[22]

However, the Fijian leaders[23] were not at all happy with the scheme for reorganization. There was a feeling of unrest and anxiety. The Fijians felt that previously the Fijian Chiefs had taken responsible positions as the rulers of their own people. All of them were working under the Officer known as the Native Commissioner. Fijian Chiefs, as Rokos, were treated as senior Officers of the Government. As the late Ratu Sukuna (later Sir Lala Sukuna) said:[24]

> [The Fijian Chiefs] were consulted by the Secretary for Fijian Affairs at every turn. That system of personal rule by the Governor through the Native Commissioner produced in the years steadfast faith, sincere attachment and abiding loyalty.

However, under the reorganization scheme the same Rokos became junior officers of the Government. They were controlled by District Commissioners and District Officers. The District Officers were invariably young and inexperienced with little knowledge of local customs and conditions. Furthermore, the Rokos no longer had direct contact with the Adviser on Native Affairs. The feeling of dissatisfaction culminated in a resolution of the Council of Chiefs

---

21 Idem.

22 Mr H.C. Monckton.

23 E.g., Ratu Sukuna (later Sir Lala Sukuna), Legislative Council Debates (1940), 402.

24 Idem.

passed in 1940 which stated:[25]

> This Council considers that Rokos should be placed directly under the Adviser on Native Affairs in their work and not under the District Commissioner or District Officer as at present.

To this the Governor replied:[26]

> It is not possible to alter the structure of government, which would be the result of placing Rokos directly under the Adviser on Native Affairs.

The Fijians continued with their protests against the decentralization policy.[27]

In 1943 the government began to draw plans for adjustments in the Native Administration in order to charge the Fijian members of the Legislative Council more directly with responsibilities in Fijian affairs and generally to consolidate native affairs under one legislation. In 1944 the Fijian Affairs Ordinance was passed. Its aim was to re-establish indirect rule; that is instead of the District Commissioners and District Officers controlling native affairs, the Fijians themselves would control their affairs through their own representatives. This ordinance charged the Fijian members of the Legislative Council more directly with responsibilities to the Council and to the Governor in matters of Fijian concern. At the same time it readjusted financial arrangements so that all expenditure on Fijian local government services might be carried on a Fijian local government budget and administered by a body composed mainly of the Fijian members of the Legislative Council. However, the administration of the budget was to be subject to the final control of the Legislative Council and the Governor.

---

25 Ibid., 401.

26 Idem.

27 E.g., see ibid., 400 - 403 and 435 - 437.

The Fijian Affairs (Amendment) Ordinance of 1966 is the current statutory authority for the system which was designed to continue the policy of building indigenous institutions. It gave statutory recognition to the existence of the Council of Chiefs. This Council was to consist of the Secretary for Fijian Affairs as President, the Rokos of the Provinces, one representative from each Province selected by the Provincial Council, one Fijian Magistrate, and one Fijian Medical practitioner to be nominated by the Secretary for Fijian Affairs and a maximum of six Chiefs appointed by the Governor.[28] The primary duty of the Council was similar to that of the Native Regulation Board created under the Native Affairs Regulation Ordinance of 1876.[29]

By the 1944 Ordinance was also established the Fijian Affairs Board comprising the Secretary for Fijian Affairs who was to be Chairman, the Fijian members of the Legislative Council, and a Legal Adviser appointed by the Governor. The Board had functions and duties analogous to the Native Regulation Board. However, the Fijian Affairs Board was given specific powers to make regulations, in relation to the Fijian people, for:[30]

(a) the peace, order, welfare and good government of Fijians and for all matters connected therewith;

(b) the observance of Fijian customary rights, ceremonies, obligations and conduct, including communal services;

(c) the provision of public services;

(d) the imposition of rates by Provincial Councils;

---

28 Fijian Affairs Ordinance 1944, s. 3.

29 See p. 24 , ante.

30 Fijian Affairs Ordinance 1944, s. 7.

(e) the jurisdiction, power and procedure of Fijian courts and magistrates;

(f) the making of by-laws and orders by Provincial Councils and District Councils;

(g) sanitation and health;

(h) fishing.

Further when any Bill was to be introduced into the Legislative Council which appeared to the Governor to affect, in any important respect, the rights and interests of Fijians then as a rule the Bill had to be first referred to the Board for consideration.[31] There were also provisions for the appointment and powers of Rokos, Fijian magistrates, District and Provincial Courts, Provincial and District Councils.[32] The Provincial and District Councils were given legislative powers pertaining to all aspects of the running of the provinces and districts, including matters of housing, bridges, sanitation, rates, pollution, gambling and the planting of food.[33]

The 1944 Ordinance underwent several changes. However, the existing system, now called the Fijian Administration, remained substantially unaltered. The changes which were made involved the inter-relationship of the various bodies and authorities to each other and to the Central Government. In other words the changes were in the scope rather than the nature of the functions. For instance in 1949 a completely revised regulation came into force. Two important changes were brought about by the new regulations. First, an elective system in choosing unofficial members of the Divisional Councils, the

---

31 Ibid., s. 11.

32 Ibid., ss. 12 - 20.

33 Ibid., ss. 21 and 22.

Provincial Councils and the Council of Chiefs was adopted. Secondly, there was a provision for the majority of the members not being salaried staff of the Fijian Affairs Board.[34]

In 1959 the Burns Commission Report[35] made recommendations relating to Fijian Administration. The Commission strongly felt that the Fijian Administration should not continue for longer than was absolutely necessary. It thought that the system was not operating for the benefit of the Fijians for these reasons:-[36]

(a) It is no longer (if ever it was) a local government organization, and it has developed and is becoming more and more entrenched as a completely exclusive, autonomous administration (with its own financial and legal advisers) divorced from the Central Government.

(b) It is tending to isolate the Fijians from all other communities.

(c) It is continuing to foster an out-dated communal system against the wishes of a large number of people who desire a much greater degree of freedom.

(d) The present "dual" system is wasteful of time and money.

(e) For its success it is almost wholly dependent upon "personalities" instead of "pin-pointed" responsibility.

However, the Commission felt that immediate abolition of the system was not justified and recommended a transition, on the following lines.[37]

---

34 Regulation No. 5, reg. 2, 8 and 14.

35 Report of the Commission of Enquiry into the Natural Resources and Population Trends of the Colony of Fiji: Legislative Council Paper No. 1 of 1960.

36 Ibid., 32.

37 Idem.

(a) The Fijian Affairs Department should be moved into the Secretariat and made an integral part of the Central Government.

(b) The title of Secretary for Fijian Affairs should be changed to "Secretary for Local Government" to whom Commissioners of Divisions would be directly and solely responsible. District Officers would continue to be responsible to the Commissioners of Divisions.[38]

(c) The Central Fijian Treasurer should be transferred to the Accountant-General's Department.

(d) Roko Tui and Buli should be paid through the District Officer's office, but Roko should be directly and solely responsible to Commissioners.

(e) The installation of a new Roko Tui should be carried out by the Commissioner and not, as was done, by the Governor.

(f) The Roko Tui should be chairmen of Provincial Councils which would continue to have power to make by-laws and levy their own rates.

(g) Programmes of work[39] and communal duties (as distinct from social customs) should be abolished.

(h) Provincial Budgets should be approved by the Commissioner.

---

38 Fiji has been divided into four administrative divisions of the central government - the Central, Eastern, Western, and Northern. Each division has at its head the Commissioner. In each division there are one or more district officers, depending on the size and needs of the division. The Commissioners are responsible for co-ordinating the activities of all departments of government within their divisions and generally to supervise the activities of government. The district officers assist them in their tasks.

39 As to programmes of work, see Roth, op. cit., 140 et seq.

As a result of the Burns Commission Report, some changes were brought about in the Fijian Administration in 1966. The Fijian Affairs Ordinance was substantially amended.[40] However, once again the changes were more in the scope rather than in the nature of the functions. The new amending Ordinance continued the existence of the Great Council of Chiefs, the Fijian Affairs Board and the Provincial Councils. The District Councils were no longer recognised. Instead there was provision for creating such other Council for any area in any Province as the Fijian Affairs Board defined. An important change was that the Ordinance did not provide for the composition of the Councils or the Board. All these were left to be prescribed by Regulations. For instance Section 4(1) of the Ordinance states,

> There shall be in respect of the Fijian people a Council called the Great Council of Chiefs which shall consist of such number of appointed, elected and nominated persons as the Governor-General may by regulation prescribe.

The provisions of the Fijian Affairs Ordinance (as amended in 1966) govern the Fijian Administration today.

Accordingly, the Fijian Administration is comprised of the Great Council of Chiefs, the Fijian Affairs Board, and the Provincial Councils. At the apex is the Great Council of Chiefs presided over by the Minister for Fijian Affairs and Rural Development. The Council consists of the Minister of Fijian Affairs and Rural Development, the Fijian members of the House of Representatives, not more than seven chiefs to be appointed by the said Minister, not more than eight other persons to be appointed by the said Minister, three persons (of whom at least two shall be members of Provincial Councils) to be elected by each Provincial Council with twenty or more members; and two

---

40 The Fijian Affairs (Amendment) Ordinance, No. 10 of 1966.

persons (of whom at least one shall be a member of the Provincial Council) to be elected by each Provincial Council with less than twenty members.[41] This Council considers legislation and proposals affecting the rights and welfare of the Fijian people which is referred to it by the said Minister and makes recommendations thereon. It also advises the Governor-General on matters affecting the rights, welfare, good government and development of the Fijian people.[42] This Council acts purely in an advisory capacity. However, it is regarded as the voice of the Fijian people generally. It is a very influential body and has from the outset been the backbone of the Fijian polity. Its current strength and influence in Fiji can be gauged from the provisions of sections 45 (1)(a), 67 (5) and 68 of the Constitution.[43] Legislation affecting Fijian land, customs and customary rights and amendments to sections 45(1)(a), 67 (5) and 68 of the Constitution cannot be passed by the Fiji Parliament unless, inter alia, six of the eight senators appointed on the advice of the Great Council of Chiefs agree.[44]

The next in the ladder of importance is the Fijian Affairs Board which is also presided over by the Minister for Fijian Affairs and Rural Development. The Board consists of the Minister, eight Fijian members of the House of Representatives elected by the Fijian members of that House and two members of the Great Council of Chiefs, not being members of the House of Representatives, elected by those members of the Great Council of Chiefs who are not members of the House of Representatives.[45] This Board is empowered to make regulations to be observed by all Fijians and to exercise vigilance over

---

41 Fijian Affairs (Great Council of Chiefs) Regulations, reg. 2 (1).

42 Fijian Affairs Ordinance, s. 4 (2).

43 See p. 208, post.

44 Constitution, ss. 67(5) and 68.

45 Fijian Affairs (Fijian Affairs Board) Regulations, reg. 2 (1).

the affairs of the fourteen Provincial Councils which are subject to the general directions of the Board.[46] The Board maintains a central secretariat at its headquarters and a Treasury which co-ordinates and assists the financial work of the Provincial Councils. It also trains and provides the senior administrative and accountancy staff of the Provincial Councils.

The third stratum is the group of Provincial Councils. For the purposes of the Fijian Administration, the Dominion is divided into fourteen provinces, each with its own Council. Each Council comprises partly elected and partly appointed members - the number of members vary from province to province.[47] Council elections amongst residents and land-owners of each Province were conducted for the first time in 1967 on a full adult Fijian franchise. In addition to those elected, the Minister for Fijian Affairs and Rural Development appoints a number of chiefs to each Council. There is however, an elected majority on each Council. The Chairman of each Council is elected annually. Besides the Chairman, there is a chief executive officer of each Council who is known as the Roko Tui. The Roko Tui is appointed by the Minister for Fijian Affairs and Rural Development on the recommendation of the Provincial Council concerned. The Councils have wide powers to make by-laws subject to confirmation by the Fijian Affairs Board. Their budgets are also subject to the approval of the Minister. The Councils are empowered to levy rates for revenue. They also have wide powers to make by-laws relating to "the health, welfare and good government" of their respective provinces.[48] Although the Fijian Affairs Board has regulation-making powers, such powers are now seldom used. Instead the Provincial Councils are now encouraged to make their own by-laws

---

46 Fijian Affairs Ordinance, s. 7 and the regulations made thereunder.

47 Fijian Affairs (Provincial Councils) Regulations, reg. 3 (1).

48 Fijian Affairs Ordinance, s. 8 (2).

to suit local circumstances. Any regulation or by-law made by the Fijian Affairs Board or the Provincial Council has to be subject to the laws of the central government so that if there is any conflict then the former shall be void to the extent to which it is incompatible with such other law.[49]

Each Province was divided into divisions called Tikina. Until 1966 there used to be Tikina Councils which were supervised by the Provincial Councils. Since then there are no longer Tikina Councils as such, although the traditional divisions of each province (tikina) still subsist.

A tikina comprises groups of villages. At the head of each Tikina there used to be a Mbuli[50] who was a salaried official of the Fijian Administration and he, like the Roko Tui, was not necessarily a person of hereditary rank. However, since 1967 the statutory recognition of a Mbuli has been discontinued.[51] Instead the Board has been given powers to appoint such officers and servants as may be necessary for the efficient discharge of its duties and responsibilities and for the proper conduct and administration of Fijian affairs.[52]

On the lowest rung of the ladder come the villages. Traditionally every village had a headman who was known as the Turaga ni Koro. The Turaga ni Koro used to be appointed on the recommendations of the inhabitants of the village. In the early days the position was held by chiefs but later this was not necessarily so. Although there appears to be no statutory recognition of this position, one still finds Turaga ni Koro at the head of each village. His duties are to see to the carrying out of social services and he has the general and overall responsibility for the village.[53]

---

49 Ibid., s. 26.

50 As to the duties of Buli see Roth, op. cit., 145.

51 Fijian Affairs (Amendment) Ordinance, No. 29 of 1967, s. 4.

52 Ibid., s. 4.

53 As to the duties of Turaga ni Koro, see Roth, op. cit., 141.

At present attempts are being made to bring matters previously handled by the Fijian Administration under the jurisdiction of the central government. The Fijian courts which heard cases arising out of Fijian Affairs Board regulations and Provincial Councils by-laws have been gradually withdrawn from all provinces as from 31 December, 1968. The ordinary judicial process now deals with infringements of all such regulations and by-laws. Similarly legislation relating to native divorces and registrations of birth, deaths and marriages is no longer separate. With the enactment of the Matrimonial Causes Ordinance[54] and the Births Deaths and Marriages Registration Ordinance,[55] there are now a uniform code of matrimonial law and a uniform system of registration for persons of all races living in Fiji.

D. Conclusion

It is apparent that over the years the Fijian Administration has acquired an assured place in the general administration of the Dominion. The majority of the Fijians have all along felt that the separate Fijian Administration has been to their great advantage. Two official reports[56] have advocated changes - in fact the Burns Commission recommended the abolition of the separate Fijian Administration. The two reports demonstrated how the separate Fijian Administration has retarded the economic progress of the Fijians. Despite this, very few changes have been made. On the contrary under the present Constitution the separate Fijian Administration has secured an entrenched position

---

54 No. 22 of 1968.

55 No. 10 of 1968.

56 The Burns Commission report and The Fijian People: Economic Problems and Prospects, a report by Professor O.H.K. Spate: Council Paper No. 13 of 1959.

and any amendment to the Fijian Affairs Ordinance, must secure the special majority required by the Constitution.[57]

This means that no matter how strongly one feels about this separate administration any changes desired will have to emanate from the Fijian people themselves. In view of the resistance offered by the Fijians in the past to alteration of the separate administration it is difficult to predict radical changes in the forseeable future. The Fijians feel somewhat secure under the present system and would rather continue with it despite its drawbacks and shortcomings. Professor Spate summed up the position well when he stated:[58]

> Together with weaknesses, some of which seem inherent, in the machine itself, this adds up to a lack of clear leadership and consequent frustration among leaders and people alike. The best men in Fijian Affairs, on and off the Fijian Affairs Board, are aware, often consciously, of this, but commitment to the system, and the lack of any clear alternative, make it difficult indeed to take successful counter-action or to launch out on a new approach.

When the seeds of the separate Fijian Administration were first sown in 1876, the whole machinery was built on the existing socio-political organisation of the Fijians. Sir Arthur Gordon relied on existing chiefly and tenurial relations for the internal government of the Fijians.

Hence the tradition was an important foundation of the system; while today, ironically enough, it is the system which perpetuates those traditions. Any changes to the machinery and system as a whole will necessarily involve changes in the attitudes of the Fijian people themselves. That is, the changes will have to be by evolution and not something which can be imposed.

---

57 Constitution, ss. 67 and 68.

58 Council Paper No. 13 of 1959, 33.

PART TWO

A SURVEY OF THE HISTORY AND DEVELOPMENT OF THE CONSTITUTION

CHAPTER III

VARIOUS STAGES OF HISTORICAL DEVELOPMENT

A. Introduction

No analysis of a Constitution can be complete without an understanding of the society for which it was designed and without a knowledge of the constitutional evolution which it represents. It has been seen that from the outset of colonial rule in Fiji the society was composed of various races and it was with this multi-racial background that Fiji became an independent Dominion within the British Commonwealth of Nations on 10 October 1970. Mindful of the problems that have arisen in other countries with similar ethnic variety, the framers of the Fiji Constitution were obliged to seek a basis for an amicable solution to the problems of a multi-racial society. However, whether the 1970 Constitution in fact achieves that aim and satisfies the aspirations of the various communities is difficult to assess in the present work. We will be concerned with constitutional rather than political issues although at times it may be difficult to draw the boundaries.

To appreciate the present constitutional framework, it is imperative that a general historical background leading up to the adoption of the 1970 Constitution be given. It is particularly important to understand that Fiji is not a homogeneous but a heterogeneous society.

B. Pre-Cession Constitutional History

The evolution of constitutional government in Fiji dates back to the period prior to the cession of the Fiji Islands in 1874. Fiji was first offered to the British Crown on 12 October 1858. This arose out of the necessity of settling a huge debt alleged to have

been owed by Cakobau, the "King of Fiji", to the American Government.[1] An offer was made to cede 200,000 acres of land to the British Government in consideration of the latter paying the American claims. This offer was declined. King Cakobau then offered Fiji to the United States of America. The Americans being engaged in a civil war, no reply was received.

By this time there was a significant number of Europeans resident in the islands who pressed King Cakobau to establish a regular form of government. Several attempts were made but these failed mainly because of the mutual suspicions and hostility of the leading chiefs.

In 1865 an attempt was made to form a Confederation. On 8 May 1865, there was an assembly of the various independent Chiefs of Fiji at Levuka. They deliberated on matters connected with the welfare of Fiji and their mutual interests. An agreement was reached that there ought to be a firm and united form of government and that there ought to be a code of laws applying to all. Accordingly, the seven paramount Chiefs of Fiji[2] agreed on a form of

---

1 The circumstances surrounding this debt to the Americans should be stated. The American Consulate was stationed on the small island of Nukulau off the mainland near Suva. On 4 July 1849, the Consul was celebrating independence day by the firing off of cannons and letting off of squibs. The house of the Consul was gutted by fire. Also various complaints were lodged against Cakobau and numerous losses ascribed to him. Claims for damages in respect of the alleged losses were made by the American settlers through their Consul. All the responsibility for these losses was put on Cakobau although he had not been the cause of these losses. The United States Government sent a representative (Commander Boutwell) to make inquiries and consequently Cakobau was asked to pay £9,000 as damages.

2 That is of Bau, Lakeba (pronounced "Lakemba"), Macuata (pronounced "Mathuata"), Rewa, Cakaudrove (pronounced "Thakaundrove"), Naduri (pronounced "Nanduri") and Bua.

Confederation.[3] They agreed to have one of them elected as President whose tenure of office was for one year and there was to be a General Assembly. This attempt to establish a form of government failed because of hostility amongst the Chiefs.

In 1867 there was another attempt to form a Confederation amongst the Chiefs of Fiji ruling Cakaudrove, Bua and Lau. A form of a constitution[4] was agreed upon on 13 February 1867 under the title of the "Tovata Ko Natokalau Kei Viti". This too vested all legislative powers in a General Assembly of the Chiefs who were parties to the Constitution. The executive powers were vested in a Supreme Chief elected by the General Assembly. This constitution was also doomed to failure for the same reason as the earlier attempt.

In the meantime King Cakobau was being pressed by the American Government for payment of his debt. He was unable to fulfil his obligation. In an attempt to secure funds, on 23 July 1868 he signed a Charter[5] granting to the Polynesian Land Company 200,000 acres of land in return, inter alia, for the payment of £9,000 damages due to the American Government but the deal fell through.

On 15 February 1869 another attempt was made to form a government by the Chiefs of Lau and in 1871 they adopted a Constitution of the Chiefdom of Lau.[6] This too collapsed.

---

3 As to the terms of the Constitution of the Confederation see G. Henderson, Evolution of Government in Fiji (1935), 17 - 18.

4 As to the terms of this Constitution see Henderson, op.cit., 19 - 21.

5 As to the terms of this Charter see Henderson, op.cit., 22 - 25.

6 As to the terms of this Constitution see Henderson, op. cit., 28 - 42.

King Cakobau with the assistance of several European settlers, formed a government for the whole country. Representatives of both races were invited to meet with a view to framing a constitution. Eventually in August 1869 the delegates met in a convention and agreed to a Constitution for the whole of the "Kingdom". The "Constitution Act" of the Kingdom of Fiji was "enacted". The preamble to this "Act" recited:

> Whereas, it is expedient for the good Government of the White and Native Population of the Fiji Group of Islands to Establish a Constitution and Legislative House of Representatives therein: and whereas, Delegates from amongst the White Residents have been Called together for that purpose : Be it, therefore, Enacted by the King and Delegates in Council now Assembled, as follows....

Then followed the details of the "enactment".[7] The Constitution Act provided for a legislature, executive and judiciary.[8] There was to be a constitutional Monarchy.[9] The executive was to consist of the King and the Ministry and the legislature comprising a Privy Council and House of Representatives. The Kingdom of Fiji was subdivided into Provinces which were to be ruled by Native Governors who were to be members of the King's Privy Council. The Privy Council consisted of the Governors and one Chief from each Distrct, and members of the Cabinet, who were ex-officio members of the Privy Council. The Privy Council was to receive all Bills passed by the Legislative Assembly and had

---

7 As to the terms of this Constitution see Henderson, op. cit., 43 - 55.

8 Article XXI provided that the Supreme Power of the Kingdom, in its exercise is divided into the Executive, Legislative and Judicial; these shall always be preserved distinct....

9 Article XXII provided that, The Government of the Kingdom of Fiji is that of a Constitutional Monarchy under his Majesty Cakobau, his Heirs and Successors.

power to suggest amendments and return the measure to the Legislative Assembly for reconsideration but it had no power of veto. The Legislative Assembly was formed of members returned by the electoral districts proclaimed throughout the islands. Membership of the Assembly was to be not less than twenty nor more than forty. The suffrage was given to male subjects of the Kingdom and the qualifications of an elector were the due payment of taxes and six months residence. There were provisions for the setting up of a judiciary with the Supreme Court consisting of the Chief Justice and two Associate Judges.

At this time, the native Fijians were obviously not familiar with this form of government which was in any case absolutely unsuitable to the conditions then prevailing. This system of government benefitted the white settlers inasmuch as it placed all political power in their hands while leaving the native people with hardly any influence.

Not only was the system of government unsuitable but the calibre of the white settlers also left much to be desired. The American Civil War caused a boom in cotton prices, and exports rose rapidly. New settlers arrived and, to augment local labour supplies, men were imported from the New Hebrides and the Solomon Islands. The influx of new settlers presently developed into a "rush" and the newcomers included far too many fugitives from justice and other undesirables. The calibre of the white settlers is clearly borne out in a Confidential Despatch by Sir Hercules Robinson, Governor of New South Wales in which he stated:[10]

3. Mr Thurston The Chief Secretary of Fiji gives a

---

10 Confidential Despatch from Sir Hercules Robinson, Governor Of New South Wales to the Earl of Kimberley, 27 January, 1873, quoted in Henderson, op. cit., 58 - 64.

> deplorable description of the character and design of the majority of the white settlers in Fiji, and assuming that his statements are correct, which I have no reason to doubt, it appears to me that they serve to prove how unsuitable the present constitution of Fiji is to the conditions existing in these islands, and how hopeless it is to expect that any government established on such principles could ever be able to protect from oppression and spoilation the native population of the country ....

Most of the white settlers were insolvent planters. They exerted themselves to the utmost to destroy the government as the best way to escape from their liabilities and from the "consequences of their acts of tyranny and murder".[11] Sir Hercules pointed out:[12]

> The White Settlers are striving to subvert the King's Government, so as to reduce the Fijians to serfdom and A feud has been begun by Her Majesty's subjects whose principal object is to kill off the Fijians and acquire by murder, treachery and fraud their lands.

As mentioned earlier, the native people had very little, if any share in the government of the country. The powers were placed exclusively in the hands of the white settlers, who were[13]

> incapable of exercising the privileges of self-government with justice or with any regard for the welfare of the great bulk of the population.

The constitution was based on European models quite unsuited to the conditions prevailing in Fiji. Traditionally, Fijians were governed through their Chiefs and Headmen. The new system was completely alien to their traditions. Matters came to a head when the King refused to accept the resignation of Ministers who had been "constitutionally" defeated by a large majority in the Assembly; the Assembly was dissolved in the middle of 1873.[14]

---

11 Ibid., 59.

12 Idem.

13 Ibid., 60.

14 The Colony of Fiji 1874 - 1924 (1925, J.J. McHugh, Acting Government Printer, Suva, Fiji), 13.

The government then drew up a new Constitution which conferred a larger share of power upon the natives. It also provided for a Legislative Assembly, consisting partly of nominated and partly of elected members. This Constitution which was never put in force was strongly opposed by Commodore Goodenough and Consul Layard, who had arrived in Fiji at the close of 1873, with instructions to inquire into the local conditions. This was in response to a new proposal by the Fijian Government to re-open the question of annexation to the British Government. This new proposal was made because of the chaos in Fiji. Trade was almost at a standstill; the Treasury was empty and the country was on the verge of bankruptcy; and some of the highest chiefs were considering secession.[15] Hence the chiefs appealed to Great Britain to bring order out of chaos. The two British Commissioners who had arrived in the country made their report to the British Government.[16] Eventually on 10 October 1874, Fiji was ceded to Great Britain,[17] and Fiji became a British Crown Colony.

C. Constitutional Development from a British Crown Colony to Representative Government

(1) 1874 - 1929

The Fiji Islands became a separate British Colony by virtue of a Charter passed under the Great Seal of the United Kingdom on 2 January 1875. Under this Charter the Government of the Colony was to be administered by a Governor appointed by the British

---

15 In two and a half years the government spent £124,000 or three times as much as it received in revenue: Fiji Annual Report 1971, 151.

16 The Colony of Fiji, 1874-1924, op. cit., 14.

17 See The Colony of Fiji 1874 - 1924, op. cit., 14 for the events leading up to the actual cession.

Crown.

There was also established a Legislative Council consisting of the Governor and of such other public officers and persons, being not less than two in number, as were nominated by him.[18]

There was also set up an Executive Council[19] comprising such members as the Governor, in pursuance of Royal Instructions received through the Secretary of State for the Colonies, might from time to time appoint. Subsequently, government was conducted in accordance with various Letters Patent[20] until 1963 when the first Constitutional Order in Council was made.

The membership of the Legislative Council was later enlarged by various Letters Patent. The first major step was the inclusion of elected members in terms of the Letters Patent of 1904. Prior to 1904 the Legislative Council consisted of six official members who were public officers and four unofficial members who were nominated by the Governor with the approval of the Secretary of State for the Colonies.[21]

In 1903 the European residents of the Colony sent a petition addressed to His Majesty the King, praying that the right might be granted to them to elect unofficial members of the Legislative Council, instead of their being appointed by the Crown on the nomination of the Governor. The petition prayed that the franchise be conferred upon male adults who were British and, who were not

---

18 Article III of the Charter.

19 Article V of the Charter.

20 There were Letters Patent of 1880, 1904, 1914, 1916, 1929 and 1937.

21 The Colony of Fiji, 1874 - 1924, op. cit., 17.

Indians, Fijians or aboriginal Polynesians.[22] The then Governor of Fiji, H.M. Jackson, favoured the petition in principle, but he opposed the view that Fijians should be excluded from representation in the Legislative Council.[23] However, the Governor concerned did agree that:[24]

> I do not think it necessary to provide representation for the Indian and Polynesian element, which has shown itself very open to corruption at the municipal elections....

Accordingly under the Letters Patent dated 21 March 1904 the Legislative Council consisted of the Governor, as President, ten official members, six elected members and two Fijian members.[25] The franchise was extended only to persons of European descent.[26] Hence only Europeans could be elected. This Constitution directed that the elected members should be elected as follows:

(a) Three members by electors not engaged in the cultivation of land and residents of the municipalities of Suva or Levuka; two of whom were to represent Suva and one to represent Levuka.

(b) Two members by electors engaged in the cultivation of land, other than for the production of sugar.

(c) One member by electors being directors or managers of companies engaged within the Colony in the production or manufacture of sugar.[27]

---

22 (1905) Fiji Royal Gazette 105.

23 Ibid., 106.

24 Idem.

25 Cl. 8.

26 Cl. 13.

27 There were only two companies so involved - the Colonial Sugar Refining Co. Ltd and the Vancouver Sugar Company Ltd.

The two Fijian members were to be appointed by the Governor from a list of six names submitted to him by the Council of Chiefs.

A few amendments were made to these Letters Patent. In 1910 the position of the half-caste community of European descent was discussed in the Legislative Council upon a motion introduced by the European elected members. It was recommended that half-castes should be eligible for admission to the European roll subject to the condition that one parent be of European descent. This recommendation resulted in the Letters Patent being amended in 1910 to include among the electoral qualifications male persons being the sons of parents of European descent, or, being the sons or lineal descendants of a European father and who could read, write and speak the English language.[28] The Letters Patent of 1914 and 1916 consolidated the instruments. They provided for an Executive Council,[29] consisting of the Governor, Colonial Secretary, Attorney-General and such other persons as the Governor, in pursuance of the Royal Instructions received through the Secretary of State for the Colonies, from time to time appointed. The Executive Council included two unofficial members of the Legislative Council who vacated their seats upon the dissolution, triennially, of the Legislative Council. These new Letters Patent further provided for a Legislative Council[30] consisting of the Governor as President, twelve nominated members, seven elected members and two Fijian members. Of the twelve nominated members, eleven had to be public officers and one could be a British subject not holding any such office. This was the first time that a person of

---

28 Letters Patent 1904, Cl. 13 as amended by Letters Patent of 1910.

29 The Colony of Fiji 1814 - 1924, op. cit., 17.

30 Cl. 6, 7, 8, 9, 10, of 1914 Letters Patent, as amended by 1915 Letters Patent.

Indian descent was eligible for nomination to this one seat. An Indian held this twelfth nominated seat between 1916 and 1923.[31]

Since 1917 the Secretary of State for the Colonies had been negotiating with the Government of India with a view to extending the franchise to the Indians.

On 25 August 1920 the Governor appointed a Commission (The Indian Franchise Commission) to report and make recommendations on the question of providing for the representation, on an elective basis, of the Indian population of the Colony by two members in the Legislative Council. The Commission held meetings in Suva and Lautoka and submitted its recommendations in April 1921.[32] Broadly, the Commission recommended the representation of Indians by two members elected by an Indian constituency of the whole Colony, both electors and candidates to have certain qualifications.[33] On 13 July 1923 the Colonial Secretary moved the following motion in the Legislative Council:[34]

> That the Secretary of State for the Colonies be respectfully invited to secure at an early date the passage of Letters Patent providing for representation on an elective basis of the Indian population by two members of the Legislative Council of the Colony in accordance with the report and recommendations submitted to the Council in Council Paper No. 1 of 1921.

In support of the motion the Colonial Secretary said:[35]

> Prior to 1917, the interests of Indians in the Council were

---

31 He was Mr Badri Maharaj; see Fiji Royal Gazette (1916) 637.

32 See Council Paper No. 1 of 1921: Journal of Legislative Council (1921), 1.

33 See idem.as to details of the recommendations.

34 Council Debates (1923), 17.

35 Ibid., 18.

> represented by the Agent-General of Immigration, and in 1917 one nominated Indian member, in no way chosen by the Indians themselves, was appointed to the Council .... The Indian population in Fiji is the second largest, and the interests of Indians are very considerable. That some measure of elective representation should be given to that community appears to be right and proper.

The motion was carried unanimously.

This recommendation of the Legislative Council was transmitted to London. A Joint Committee of the Colonial Office and the Government of India sat in London and considered the recommendations of the Council with regard to Indian representation. This culminated in the Letters Patent of 1929. The membership of the Legislative Council was expanded by Letters Patent of 1929. These Letters Patent were historic for the Indian community in Fiji inasmuch as they granted that community representation as of right in the Legislative Council. Under these Letters Patent,[36] the composition of the Legislative Council was to be the Governor as President, thirteen nominated members, six European elected members, three Fijian appointees or nominees and three Indian elected members. The nominated members had to be persons holding public office.[37] The Fijian members were again nominated by the Governor from a panel of four to six names submitted by the Council of Chiefs.[38]

(2) 1929 - 1937

In spite of the expansion of membership by the Letters Patent of 1929 the Indians and the Fijians obviously occupied a subservent position in the legislature of the Colony. Hence, as soon as the

---

36 Cl. 7.

37 Cl. 8.

38 Cl. 10.

Indians were represented in the Council they commenced their battle for equality by a vociferous expression of their demands. The first three Indian elected members[39] took their seats in the Legislative Council on 25 October 1929. In the same session of the Legislative Council an Indian member[40] proposed the motion:

> That the Council recommends to His Excellency the Acting Governor that he be pleased to convey by telegraphic message to His Majesty's Government the view of this Council:-
>
> (a) That political rights and status granted to Indian settlers in this Colony on racial lines are not acceptable to them; and
>
> (b) That Indians in Fiji should be granted Common Franchise along with other British subjects resident in the Colony.

This motion was seconded by another Indian elected member.[41] The motion was naturally very vehemently (and insultingly) opposed by the European members, particularly the elected members.[42] The Fijian members merely joined in the opposition without much comment. The Europeans opposed the suggestion of a common roll, of course, because they would be outnumbered by Indian voters. They deprecated the aspiration of the Indians for equality. As the senior elected member said in opposing the motion:[43]

> Gentlemen, can you expect the European Elected Members

---

39 Messrs, Vishnu Deo, Parmanand Singh and James Row Ram Chander.

40 Mr Vishnu Deo: Fiji Legislative Council Debates (1929), 178 col. 2.

41 Mr Parmanand Singh.

42 Fiji Legislative Council Debates (1929), 178, col. 2 and 187, col. 2.

43 Ibid., 182 col. 2.

> to support this motion when we know absolutely that in ten years, or at the furthest, twenty years, we will be utterly and entirely swamped, not ourselves perhaps but our descendants and our successors in the Colony.

This motion was defeated with only the three Indian members voting for it. Immediately after losing the motion, the three Indian members withdrew from the Council and tendered their resignations in protest against an electoral system on racial lines. As will be seen later, the Indian leaders continued to adhere to the principle of a common electoral roll and the European and the Fijian leaders continued to oppose the aspirations of the Indian community.

On the resignation of the three Indian members, no candidates offered themselves to fill the vacancies for three years. Subsequently representations were made to the Government by the Indian leaders for a common franchise. It was argued that under a communal franchise there was necessarily unfair discrimination between races and equality of citizenship was impossible.[44]

Two of the three vacant Indians seats were filled in 1932. Again in the very first session of the Legislative Council one Indian member proposed another motion for a common roll which was seconded by the other Indian member. The European members maintained their position takenon the 1929 motion and strongly opposed the motion. However, the mover withdrew the motion on the express undertaking given by the Governor that he would put the motion fully to the Secretary of State as an expression of the mover's views, with the Hansard report of the debate.[45]

In the meantime religious differences developed among the

---

44 Address by His Excellency the Governor, 13 May 1930: Fiji Journal of the Legislative Council (1930), 5.

45 Council Debates (1932), 390.

Indian community. Religious preachers began to arrive from India and there was strong religious antagonism particularly between the Hindus and Muslims. The religious tension was at its highest point in the thirties. There was discord throughout the Colony. Religious leaders baited one another and their adherents were drawn into opposing factions, so much so that there began a "sangattan" (boycott) movement under which the followers of the religion of Islam were boycotted by those of the Hindu faith. This led to a demand by the Muslims for separate Muslim representation.[46]

It is pertinent to point out the exact nature of the Indian grievance at this stage. This was aptly stated in 1935 by the Governor of Fiji, Sir Murchison Fletcher, thus:[47]

> In my reply to Lord Passfield I pointed out that the discussions had hitherto proceeded upon the assumption that the Indian population had a genuine desire for democratic institutions. A close study of the situation had convinced me that this was not in fact the case. I proceeded to examine the matter at length. I expressed my conviction that the Indians as a whole had no quarrel with the Crown Colony system. What they objected to was the assigning to the white settler of powers or control in matters where their interests were involved, while they themselves were given no voice. Steps had been taken in various directions to set this matter right. Representative Indians had informed me that they were satisfied with the present constitution of the Legislative Council - subject to the claim by the Muslims for a separate seat....

The Indian community as a whole desired equal representation and the introduction of a common roll but there were differing views as to how best to attain these objects. One view favoured a boycott

---

46 See A.R. Sahu Khan, Muslim Appeal for Separate Political Rights in Fiji (1958).

47 Council Debates (1935), 258.

of the Legislative Council and non co-operation with the Government, another advocated the election of representatives to fight the common roll battle within the Council.

The latter plan seems to have gained significant support and the Indians continued their battle for better representation with a common roll as the ultimate goal. Early in 1933 the reply of the Secretary of State for the Colonies rejecting the proposals of a common electoral roll was received. As a result, on 22 February 1933 the two Indian elected members of the Legislative Council left the Council and intimated that they would both resign but as it turned out only one did.[48] He was however, re-elected in June. Since 1929 one of the three Indian seats continued to remain vacant. This was so because the polls in that particular constituency were controlled by the advocates of non co-operation. It was generally recognized that since 1929 Indian politics had been dominated by a relatively small but very active party who had been able to control the polls. Some sections of the Indian community had wished to return representatives who had been willing to take part in the Legislative Council under the existing constitution but they had been deterred by their conviction that their nominees would be defeated by the advocates of non co-operation. There was also a very large section of the Indian community which regarded nomination as the only effective safeguard by which the sectional interests of the Indian community could be adequately represented. The Muslims, of course, clamoured for separate representation, failing which they favoured representation by nomination as the second alternative.[49]

The Europeans, on the other hand, steadfastly opposed any

---

48 Mr K B. Singh.

49 Council Debates (1934), 46.

European opposed

representation of the Indian community from the beginning. As early as 1904 the European community in their petition for greater representation of themselves in the Legislative Council expressly demanded that Indians (and Fijians) be excluded from any representation. This view of the European settlers extended not only to the Legislative Council but also the municipal institutions. Hence a brief reference to the municipal institutions is imperative.

(a) Municipal Institutions

Until 1935 (after the Municipal Institutions Amendment Ordinance was passed) the Municipal Council had been successful in keeping the Indians out of the Council. The attitude is exemplified by the remarks of a European elected member in the Legislative Council:[50]

> The Municipal Council, Sir, is a Council, which should be respected. I, for one, do not want to sit there - I fill a high and honoured position there - unless I have men equal to myself sitting alongside me when dealing with business matters connected with the Council. If you do not give us this power, and amend this Ordinance, Sir, the chances are that some of these days we will have a Ratu Tomi (No., not a Ratu: I would not mind a Ratu - a Fijian - at all; they are very intelligent) : but we will have some uneducated Indian elected to the Council.

Under the Municipal Institutions Ordinance 1909[51] any occupier, lessee or owner of any rateable property within any town or ward was entitled to be registered as a voter. The proposed amendment introduced a literary test in English. This amendment was passed by the Legislative Council but it did not receive the Royal Assent. However, in 1915, the European members again managed to have the amendment passed. This time the Royal Assent was given and the amendment became law.[52]

---

50 Council Debates (1912), 96 col. 1.

51 S. 20.

52 Municipal Institutions Amendment Ordinance 1915.

The Indians became dissatisfied and continued their agitation to have their grievances redressed. The main grievance of the Indian Community was the insertion of the literacy test by the amendment of 1915, whereby the qualification of an elector was that he "can read, write and speak the English language." This, in effect, barred any Indian representatives from the municipal institutions, especially the Suva and Levuka town councils, despite the fact that the Indian population of Suva was more than double the European population. Representations were made by the Government of India to the Colonial office, (in regard to both national and municipal enfranchisement) which in turn referred the matter to the Fiji Government. The Fiji Government,[53] realising the import of this pronouncement, appointed an unofficial committee on 29 December 1927 to investigate the issue.[54] The majority reported that no amendment of the law was necessary. The minority[55] recommended that the language qualification should be widened to include the Hindustani, Tamil and Fijian languages as suggested by the Government of India. The report was considered in the first instance by a Commission led by Sir A.K. Young whose report was made in 1929. The Committee's report and that of the Commissioner were both sent to the Colonial Office which transmitted them to the Government of India.[56] The Government of India was unable to agree to the proposal that thelaw should be left unchanged. In their opinion there was no reason why the qualification

---

53 See the Council Paper No. 15 of 1927. This Council Paper contains a proclamation by the Government of India published in the Indian Parliamentary Paper of 12 January 1927, relating to the position of the Indian Community in Fiji.

54 The committee comprised 5 Europeans, 3 Indians and 1 Fijian: Council Paper No. 38 of 1929.

55 The three Indian members.

56 See Council Papers Nos 38 and 39 of 1929 for the reports of the Committee and the Commissioner respectively.

of literacy should not be extended for Indians, so as to include the capacity to read and write Tamil and Hindustani. They felt, however, that a knowledge of English might be desirable in the case of members of municipal bodies but they could not see how such a qualification was desirable for electors. The Colonial Office then referred the matter to the Fiji Government desiring the inclusion of the Indian languages. In the meantime the Governor had changed and nothing much was done to amend the legislation. However, in 1935, as the result of pressures exerted by the Government of India, the Secretary of State instructed the Governor of Fiji to bring about alterations in the composition of municipal institutions and eventually, the municipal institutions came under the control of the central government. That is all the members were to be nominated whereas in the past most were elected.[57]

The history of the 1935 Ordinance is of great interest. There was very strong opposition by certain sections of the European community. The Governor was able to secure the passage of the legislation very tactfully and with usual British diplomacy by presenting two alternatives namely:

(a) the introduction of a bill to establish a common municipal roll; or

(b) the acceptance of central government control.

Obviously, the lesser of the two evils, the second, from the European point of view, was accepted. They could not tolerate an Indian majority in the municipal councils.

---

57 The New Ordinance (The Municipal Institutions Amendment Ordinance No. 15 of 1935) provided for the appointment of seven official members and six unofficial members - two Indians, two Fijians and two Europeans - nominated by the Governor. The Chairman also was to be appointed by the Governor from the official members.

(b) The Legislature

In the Legislative Council the Europeans continued to oppose a common roll. However, by 1935 the Europeans faced another threat. Certain influential Europeans expressed their serious concern that the representation of their interests should have passed so largely to electors who were not strictly members of their own community. They referred to half castes. They feared that before long the so-called European roll would become in effect a half caste roll.[58]

The Europeans also claimed that because the major industries of the colony were established by European capital and European management they should have a greater say. The right of racial representation, having been conceded to the Fijians and Indians, the Europeans asked that their former rights be restored to them by means of nomination of members by the Governor.[59]

They supported the nominative system for another reason. If the electoral system was maintained, the rapidly increasing preponderance of the Indians would inevitably result in the merging of the then communal rolls in one common roll. Accordingly, it was urged that nomination was the only permanent safeguard of the important stake which European interests possessed in the Colony. They regarded the nomination system as the only means by which an even balance could be maintained between the communities.[60]

---

58 In 1910 when the proposal was first made to include half-castes in the European roll, there were very few half-castes who had the necessary qualifications. By 1935 there were 1036 European electors and 459 half-caste electors and the half-caste population was only about 1,000 less than the European population: Governors' Address Council Debates (1935), 160.

59 Ibid., 160.

60 Idem.

The Fijian stand was not as involved as those of the Europeans and the Indians. The Fijians claimed that when Fiji was ceded to Great Britain in 1874, it was done in the belief that they would be governed in accordance with British traditions and that their interests would accordingly be safeguarded. They were content to accept the leadership and guidance of the British but by 1935 they began to fear that the rapidly increasing Indian population and the demand for a common roll might bring about Indian domination in the political field. They too, accordingly, saw the nomination system as safeguarding their interests.[61]

The Indians continued their battle for equality of status. As has been said earlier, the Indians sought a common roll not for its own sake but as a means of securing equality of status. As an Indian elected member said in 1934:[62]

> For many years past the European community has enjoyed the privilege of electing its members to this honourable Council, and my community was not granted this privilege until the year 1929, and in spite of its numerical superiority it was given only three representatives against their brethren given to the European community. My community desires equality, and it is because it regards a common roll as the best means to obtain full equality that we Indians now fight for the common electoral roll.

On March 23 1934, the Indian members again introduced a motion for common roll. Not surprisingly, the motion was overwhelmingly defeated. Because the demand for a common roll was understandably - from the European and Fijian point of view - consistently opposed by these two communities, certain sections of the Indian community compromised by agreeing to a system of

---

61 Ibid., 161.

62 Council Debates (1935), 80.

nomination under which the same number of seats would be assigned to each racial group. In support of this demand about four hundred Indians submitted a written petition to the Governor in April or May 1934. A second petition signed by three hundred and ninety-eight persons was submitted to the Legislative Council on 5 May 1935. The Muslim community also supported the nomination system, but another section of the Indian community, represented by the Indian Association, was not in favour of the suggested compromise.

On 16 May 1935, an Indian member introduced a motion in the Legislative Council:[63]

> That in the opinion of this Council it would be in the best interests of the Colony and the various races resident therein if the European and Indian members as well as the Fijian members were nominated and not elected - an equal number of seats to be reserved for each of the three communities.

This motion was surprisingly seconded by a European elected member[64] who admitted that he was doing so with "mixed feelings".[65] The seconder made it clear that he and his followers supported the motion because they felt this was the best protection against Indian domination which would otherwise result from a common roll. The European community believed that the Secretary of State might give way to pressures from the Government of India and the India Office and agree to introduce a common roll. It was therefore better for them to accept the system of nomination with equality of seats for each of the three major races.

---

63 Council Debates (1935), 78.

64 Sir Maynard Hedstrom.

65 Council Debates (1935), 82.

This motion was nonetheless opposed by some European members and petitions were presented in opposition to it. The motion was passed, with the Government and Fijian members abstaining from voting or speaking on the issue. The reason for the Fijians' abstention was an earlier resolution adopted by the Great Council of Chiefs (of which the Fijian members of the Legislative Council were members). In November 1933, after a debate on the opposing principles of election and nomination the Great Council of Chiefs had resolved:[66]

> That this Council records its strong and unanimous opinion that Fiji, having been ceded to Her Majesty the Queen of Great Britain and Ireland, her Heirs and Successors, the immigrant Indian population should neither directly nor indirectly have any part in the control or direction of matters affecting the interests of the Fijian race.

The Fijian members were in a difficult position, as was later admitted by them in a letter to the Acting Colonial Secretary, dated 5 November 1935.[67] They had no time to discuss the current motion with the Council of Chiefs. They felt that to move an amendment in the terms of the resolution of the Council of Chiefs would have been an unwarranted rebuff to Indian efforts for political peace and goodwill but to support the motion would have been an act of disloyalty to those who had put trust in the members. Hence the easy way out was to refrain from voting or participating in the debate.

After the motion was passed, the Governor forwarded to the Secretary of State copies of the debates and of the petitions. Because of their importance the Secretary of State wished the proposals comprised in the motion, to be fully ventilated throughout the colony

---

66 Ibid., 174.

67 Idem.

and that adequate time be given for discussion and deliberation. To enable this to be done, the term of the then current Legislative Council was extended for another year.

As a result of the request of the Colonial Secretary for an expression of opinion from the various communities on the constitutional issue, the Fijian members of the Legislative Council held discussions with the senior Chiefs. An emphatic statement by the Fijian Chiefs ensued:[68]

> [W]e choose, with the full support of native conservative and liberal opinion, the system of nomination, believing that along this road, and along it alone, the principle of trusteeship for the Fijian race can be preserved and the paramountcy of native interests secured.

Discussions and meetings were held throughout the Colony regarding the principles and implications of the nomination system. Eventually on 12 November 1935, a European elected member introduced a motion similar to the one passed earlier. This new motion read:[69]

> That in view of the changed and changing conditions of the Colony opinion of the unofficial members of this Council is that a system of nominated unofficial representatives will be better suited to the present and future interests of the Colony than the existing system of elected representatives.

This motion was duly passed by the Council. This motion was introduced and agreed to by the European members not from any sense of equality as such, but because it was felt that:[70]

---

68 Council Paper No. 47, Journal of the Legislative Council (1935).

69 Council Debates (1935), 269.

70 Ibid., 297.

> The only way that we can seek to ward off the common roll menace is by the reversion to the nomination principle.

This motion was opposed by two European elected members.[71]

The opposing views were forwarded to the Secretary of State for the Colonies. In 1936 the Secretary of State informed the Governor that in view of the sharply divided views as regards nomination and elective systems amongst the European and the Indian communities, a compromise would be imposed. As a result some of the European and Indian members would be elected and others nominated. As for the Fijian members, since they were unanimous in their views to continue with the current system, no change in the system of their nomination was contemplated.

Consequently, on the 2 April 1937, new Letters Patent were passed which revoked the earlier ones. Under the new "Constitution" the Legislative Council consisted of the Governor, as President, three ex officio members - namely the Colonial Secretary, Attorney-General, and Treasurer of the Colony, thirteen other official members, five European members of whom three were elected and two nominated, five Fijian members (all of whom were nominated from a panel of seven to ten members presented by the Council of Chiefs) and five Indian members, of whom three were elected and two nominated.

The new Constitution, it is submitted, was designed to end the long and embarrassing agitation on the part of the Indian community for equality with the other communities in the government of the Colony. The new Constitution seems to have been reasonably well accepted by the Indian communities at the time. This is borne out by the absence of political friction in the years that followed the adoption of the new Constitution.

---

71 Mr J.P. Bayly and Mr T.W.A. Barker.

(3) 1937 - 1950

During the period from 1929 to 1937, the Indian community was concerned with constitutional reforms, particularly with the acceptance of their equality with other races. Once this was achieved, the Indian community was relatively content and was prepared to co-operate in the Legislative Council. Thus an Indian elected member, Mr Vishnu Deo, who was one of the three who had walked out of the Council in 1929 and remained out until after the new Constitution was presented in 1937 frankly admitted:[72]

> It is true, Sir, that in 1929 I did advocate common electoral roll, but from 1937, Sir, I myself have co-operated in this Council under the system of communal electoral roll under which, Sir, equal racial representation was recognized.

However, as will be seen, the post-1937 era seems to centre on European agitation for a greater share in government and the movement of self government. But this agitation, at least on the surface, was not for greater European say but for greater popular participation.

Thus on 26 August 1943 a European elected member introduced a motion in the Legislative Council the effect of which was that the unofficial Europeans and Indian members would be elected, instead of partly elected and partly nominated, and that the Fijian members would be elected by the Council of Chiefs. Secondly the numbers of European, Indian and Fijian unofficial members would be increased to six of each. Thirdly the number of official members would be reduced to provide for an unofficial majority in the Council, with the Governor having a right of veto.[73]

---

72 Council Debates (1946), 189.

73 Council Debates (1943), 57.

This motion was debated and in principle it was accepted by all the Indian and European unofficial members. The Fijian members opposed the proposed changes. However, no vote was taken on the motion. The mover agreed with the Governor that the motion be withdrawn and the matter was referred to a select committee. The committee made a report which was tabled, but not read in Council, on 22 December 1943. Nothing further was heard of the report.[74]

On 31 August 1945 the same European elected member (Mr A.A. Ragg) called for the abolition of the Legislative Council with the official majority. He said,[75] "the humbug of this representation should be done away with".

On 17 December 1945, Mr A.A. Ragg again attacked the Legislative Council with an official majority. He stated:[76]

> I can say that (unofficial members) have no actual responsibility, in other words they are used here to give adherence to a Bill, which practically speaking, they have no power to control and I think it will be admitted, at least in any civilized country in which even a modicum of democratic government exists, that he who pays the piper should call the tune. We do not do it in this Council nor do we do it in the community .... We cannot go on much longer under this pseudo constitution which purports to give us political liberty but which on analysis has the opposite effect.

The agitation by the Europeans seems to have been precipitated by the colonial policy declared by the Secretary of State for the Colonies who, on 12 November 1945, issued a circular

---

74 The writer has not been able to have access to a copy of this report.

75 Council Debates (1945), 141.

76 Ibid., 263.

emphasizing that political development must be "the concern of the ordinary people of the country" and not regarded "as an activity of 'Government' ".[77] The circular also emphasized that it intended to encourage and give "as much self-government as possible as soon as possible for Colonial territories".[78] As a result on 21 December 1945, a European elected member introduced the following motion:[79]

> That this Council is of the opinion that in view of the constantly reiterated principle of policy of the Colonial Office 'as much self-government as possible as soon as possible for colonial territories' and in view of the present and proposed increases in taxation, our Constitution be revised and amended to increase the number of elected representation of the people so that a significant measure of control may be exercised over the raising and the spending of these comparatively huge sums of money which the people of this Colony will be called upon to provide.

This motion was not however agreed to by the majority of the unofficial members.

Then in 1947 the Colonial policy was enunciated by the Secretary of State for the Colonies. This policy was of course meant to be the guiding principle of all the colonies and not only for Fiji. The Colonial Secretary stated:[80]

> I can say without hesitation that it is our policy to develop the colonies and all the resources in such a way as to enable their people speedily and substantially to improve their economic and social conditions and as soon as may be practicable to obtain responsible self-government.

---

77 Ibid., 425.

78 Ibid., 424.

79 Idem.

80 As was reported in the local daily newspaper, Fiji Times and Herald (15 July, 1946).

He made it clear that:[81]

> The colonies are to us a great trust and their progress towards self-government is a goal towards which His Majesty's Government will assist them with all the means in its power. They shall go as fast as they show themselves capable of going. I would that this policy was better known and better understood.

On political development, he stated:

> Every endeavour is being made to accelerate progress towards self-government."[82]

Thus, in 1946 a memorial was presented to the Secretary of State for the Colonies by the European Electors Association which in substance demanded a greater measure of political control over their own affairs by the people of Fiji. The prayer of the memorial was refused and the only concession made was that civil servants were enfranchised. The Secretary of State's reply to the memorial was to the effect that he was not satisfied that there was a sufficient body of people in favour of a revision of the constitution. To this reply a further letter dated 5 February 1947, was sent informing him that the Association did not agree with that contention and requesting that a plebiscite be taken to decide the matter.[83] However, the request for a plebiscite was not accepted. The request for constitutional change was also turned down.

Consequently in 1948 a European elected member, who was also the President of the European Electors Association of Fiji, proposed the following motion in the Legislative Council:[84]

---

81 Idem.

82 Idem.

83 For a full context of this letter and the reply thereto see Council Debates (1948), 168 - 170.

84 Council Debates (1948), 167.

> That this Council considers that, in view of the increasing population of the Colony and the advances made in the social, educational and economic spheres by its peoples, a greater measure of political control of our own affairs is necessary and desirable, and advises that our Constitution be amended to provide representation on the following lines ....

Then followed the details of the composition of the Legislative and Executive Councils. In substance, it was that the Legislative Council should consist of the Governor, as the President, four ex officio members, six members nominated by the Governor, and six representatives of each of the three major races elected by the people. The Executive Council was to consist of the Governor, as the President, the four ex-officio members of the Legislative Council, one nominated member and three elected members chosen from a panel of six names submitted by the elected members of the Legislative Council.

This motion was amended to read that a committee be appointed to consider and report on the desirability of granting to the peoples of Fiji a greater measure of political control over their own affairs and to recommend amendments to the Constitution. As a result, a Constitution Committee was appointed by the Governor, comprising two members of each major race - Indian, Fijian and European. The committee heard representations from various sections of the community. Essentially, the committee recommended that the proposed Constitution should be based on the following principles:

(a) Equal representation of the three main races.

(b) Election of all the unofficial representatives.

(c) No combination of the representatives of two races should be able to act detrimentally to the interests of the third race.

(d) The Government should have the balance of power, with special safeguards for Fijian interests when these were in question.

(e) The Imperial Government should have control over all but local affairs.

The Committee presented its report[85] in July 1949 but no active steps were taken to carry out these recommendations.

(4) 1950 - 1965

In the fifties no effective and significant constitutional "agitation" took place. The only matter of some significance was a motion introduced in the Legislative Council by an Indian elected member and seconded by a European elected member on 9 April 1959.[86] The motion called for abolition of the nomination system and an increase in the number of unofficial members to eighteen, comprising six Indians, six Europeans and six Fijians, all of whom were to be elected on three racial rolls. This motion was defeated. However, towards the end of the fifties and in the early sixties, very important occurences took place which collectively resulted in constitutional changes.

At the end of 1959, there was an industrial strike involving the oil workers which culminating in a riot in Suva developed into an anti-European "incident". There were also sympathy

---

85 For a full report of the Committee see Council paper No. 15 of 1949: Journal of the Legislative Council (1949).

86 Council Debates (1959), 95.

strikes by other unions. The Government was obliged to invoke emergency powers and a night curfew was imposed in Suva, Lautoka and Nadi. In January 1960 a one man commission of enquiry was set up to investigate the disturbances.

Also in 1959 the Burns Commission was set up as a "Commission of Enquiry into the Natural Resources and Population Trends of the Colony of Fiji". Though the Governor made statements on proposed reforms, little could be done until the presentation of the report by the Burns Commission.[87] The report was presented in January 1960.[88] In the body of its report the Commission included references to political considerations. It acknowledged that, although its terms of reference did not require the Commission to comment on constitutional or administrative matters, consideration of such matters was warranted in view of the representations made to it. The Commission was strongly opposed to the continuation of the separate Fijian Administration which was felt to be retarding the progress of the Fijians.[89]

The Burns Commission also felt that the Council of Chiefs did not fully represent Fijian public opinion and that an opportunity should be given to the ordinary citizens to choose at least

---

87 E.g., See the Governor's address in Nov., 1959: Council Debates (1959), 343 and 346.

88 The full report appears in Council Paper No. 1 of 1960: Journal of the Legislative Council of Fiji (1959). Cf. Council Debates (1960), 405.

89 As to Fijian Administration see Ch. II, ante.

some of their representatives. But the Commission did not favour the Chiefs being entirely deprived of their traditional right to select representatives. As a compromise the Commission recommended, inter alia, that the Council of Chiefs should elect two Fijian members of the Legislative Council, the three others being elected by adult Fijian males of the respective constituencies. The Government accepted this recommendation in the "Statement of Government Policy on the Recommendations of the Burns Commission".[90] This recommendation was also accepted by the Council of Chiefs who felt that direct elections were inevitable and that it was better to make the change at that stage than have it possibly forced by circumstances at a later date.[91]

Then there was the "pressure" from the United Nations Special Committee on Colonialism. With the admission of Afro-Asian nations, the United Nations became an active opponent of colonialism. As had been appropriately observed:[92]

> However else they might differ in race, religion and nationality, Ghanians, Egyptians, Lebanese, Indians and others shared one bond bred in their recent history against colonialism.

The Special Committee advocated independence not only for trust territories, but also for the colonial possessions of Western Powers
Also the granting of Independence to Colonial Countries & peoples - Started Dec 1960

90 Council Paper No. 31 of 1960.

91 Council Paper No. 33 of 1960, 7.

92 W. J. Hudson, Australia and the Colonial Question at the United Nation (Sydney, 1970), 33.

powers. Fiji was in this latter category. Of vital importance was the General Assembly's declaration on the granting of independence to Colonial countries and peoples. This was contained in the Resolution of 14 December, 1960.[93]

---

93 General Assembly's Resolution 1514 (XV) stated:

> Mindful of the determination proclaimed by the peoples of the world in the Charter of the United Nations to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom ...
>
> Recognising the passionate yearnings for freedom in all dependent peoples and the decisive role of such peoples in the attainment of their independence ...
>
> Convinced that all peoples have an inalienable right to complete freedom ...
>
> Solemnly proclaims the necessity of bringing to a speedy and unconditional end to colonialism in all its forms and manifestations;
>
> And to this end
> Declares that:
>
> 1. ....
> 2. All peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> 3. Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence ....
> 4. Immediate steps shall be taken, in trust and non self governing territories or all other territories which have not yet attained independence to transfer all powers to the peoples of those territories, without any conditions or reservations ... to enable them to enjoy complete independence and freedom....

The United Kingdom, as a permanent member of the Security Council, could not ignore the General Assembly's declaration. It was not only the declaration itself but also other factors - principally the 1959 riots and the Burns Commission report - that caused the United Kingdom Government to take progressive strides in relation to independence for Fiji. Fiji, however, presented a peculiar problem to Great Britain inasmuch as independence was not sought by all the racial groups.

In his opening address to the Legislative Council in 1960 the Governor spoke of constitutional changes.[94] He voiced the belief that the time had come to consider some modifications of the current constitution and he hoped that there would be changes before the following general elections (in 1962) which would give more responsibility to unofficial members without making any radical alteration in the composition of the Council.

In the meantime the Indian community in Fiji had also been pressing for constitutional change. For instance, the Indians formed an organisation called the Fiji National Congress, a political organisation headed by an experienced politician, Mr Ajodhya Prasad. In 1960 this Congress published a memorandum entitled "Internal Self-Government for Fiji" which outlined not only the various grievances of the Indian community but also how colonial rule had failed to secure prosperity for the Fijians as promised in the Deed of Cession. A copy of this memorandum was sent to the United Kingdom, the United Nations and the Council of Chiefs.

---

94 Council Debates (1960, 405.

The Council of Chiefs had recommended that provision should be made for the direct election of three Fijian members as proposed by the Burns Commission. It was desired that amendments to the Letters Patent be made in sufficient time to allow the general elections of 1962 to be held in accordance with the Burns Commission proposals.

The British Government accepted that constitutional changes were needed. Though the existing constitution was suited to the early stages of colonial development, it had the disadvantage of having an adverse effect on training people for greater responsibilities. It was acknowledged that an official majority, if retained for too long, could have an inhibiting effect on healthy growth. More important:[95]

> It [was] the declared policy of Her Majesty's Government to guide dependent territories to take increasing responsibility for their own affairs and that there [were] many people of all races in Fiji who [were] as capable of accepting responsibility as those in territories which then had much more advanced forms of constitution.

The British Government was cautious and reluctant to abolish the official majority without making any change in the executive body. It believed that if there was to be an unofficial majority, unofficial members must be prepared to help form a government and share responsibility for the government's policy and decisions. The British Government desired to adopt the "member"

---

95 Opening Address by the Governor of Fiji in the Legislative Council on 19 April 1961: Council Debates (1961), 3.

system as the first step to responsible government. This would give both political leaders and government officers an opportunity of learning new techniques and adjusting themselves to new relationships. This was to be a transitional stage leading to ministerial responsibility. To enable the British Government to learn of the views of the peoples of Fiji, the proposed constitutional changes were embodied in a Council Paper [96] so that they could be discussed. The proposals contemplated two stages. The first stage was the "member" system. Under this, it was proposed that, at a time to be agreed, the Governor would invite unofficial members of the Executive Council to undertake supervisory functions over groups of government departments; if they declined, other members of the Legislative Council would be invited to serve. Such persons would be called "Members". They would have no executive authority, but it was proposed that all policy matters relating to their departments would be referred to them and they would have a large say in policy-making. The Members were expected to introduce in the Legislative Council bills relating to their departments and there was to be collective responsibility of the Executive Council. If the system were accepted, the Legislative Council was to consist of eight officials, four unofficial members of Government and eleven other unofficial members.

The second stage was to be the ministerial system, with executive responsibility. Under this proposal there were to be three ex-officio members of the Executive Council with four to

---

96 "Government Proposals for Constitutional Reforms", Council Paper No. 8 of 1961.

six unofficial members, all of whom would be Ministers. Members of the Executive Council would be appointed by the Governor from the elected members of the Legislative Council.

Accordingly, the Government of Fiji through the Acting Colonial Secretary, introduced the following motion in the Legislative Council:[97]

> That this Council welcomes the constitutional proposals as set out in Council Paper No. 8 of 1961.

The mover made it very clear from the outset that:[98]

> Government is not seeking approval or any decision on the proposals set out in the Council Paper. The purpose of this debate is to obtain the views of the Members of this House on the broad constitutional front.

The motion was opposed by nearly all of the Fijian (and European) members. The reason for their opposition was their belief "that the direction was towards complete independence of Fiji".[99] It was made clear by the Fijians that:[1]

> Any proposal for constitutional changes that ignores and does not take into consideration the Deed of Cession is ill-conceived .... Furthermore, the development of any constitution in this Colony that ignores the Deed of Cession will not be on stable ground.

---

97 Council Debates (1961), 129.

98 Idem.

99 Ratu K.K.T. Mara (as he then was); ibid., 133.

1 Idem.

The Indian members unanimously supported the motion. The European members supported some changes but they strongly opposed major constitutional change.

Since the intention of the motion was to take the views of the various communities regarding constitutional change, the Government felt that no vote was necessary. Accordingly, it was unanimously agreed that the best way to handle the situation was to withdraw the motion. This was accordingly done with the general concurrence of the leaders of the three groups.

After the motion was withdrawn, there were discussions between the Governor and the members of the Legislative Council. The unofficial members continued to be divided on the composition of the Legislative Council. There was a wide measure of agreement, however, that separate communal rolls should be retained. Nonetheless some Indian members suggested that a common roll constituency should be introduced on an experimental basis. There was also a suggestion that five members of each race should be elected on separate communal rolls and three others (one from each race) elected on a common roll. The Fijians and European members, however, absolutely opposed the introduction of common roll in any shape or form. The Governor recommended against any change of this kind.

On the representation of the three main racial groups, the Fijians considered that there should be four elected Fijian members and two elected by the Council of Chiefs and that the Indians and Europeans should, each have four elected and one nominated member. The extra Fijian member was seen by the Fijians as recognition by Her Majesty's Government of the special position

of the Fijian people under the Deed of Cession and in subsequent promises. They demanded that the constitution should formally record this. They also felt that the Europeans and Indians should be equally represented and that the official majority should be retained.[2] The European members supported the Fijian proposal.

The great majority of the Indian members were opposed to the suggestion of an additional Fijian member but were divided as to the composition of the Legislative Council. One member proposed a common roll constituency with an unofficial majority. Another rejected a continuation of nominated members. Another spoke of a separate Muslim representation.[3]

Later in 1961 the Governor sent a despatch regarding his views to the Secretary of State for the Colonies. A Council Paper, containing copies of the Governor's despatch and of the Secretary of State's reply was issued in November 1961.[4] That paper proposed that there should be four elected members for each of the main racial groups. In the case of the Fijians there was to be, in addition, two members elected by the Council of Chiefs, while the Indians and Europeans would continue to have two nominated members. The franchise was to be extended to women.

The Secretary of State for the Colonies accepted the above

---

2 "Proposed Changes in the Composition of the Legislative Council", Council Paper No. 40 of 1961, 3.

3 Idem.

4 Ibid., 1 - 5.

recommendations and agreed that there ought to be an increase in the number of seats but with preservation of parity between races and the official majority.

The Fijians displayed their strong opposition to drastic constitutional changes. However, the British Government was of the equally strong opinion that changes were inevitable.

> But it should be recognized now that it is the long-standing policy of Her Majesty's Government to help dependent territories to attain self-government as soon as they are ready for it.[5]

The British Government did appreciate the apprehensions of the Fijians that any major change in the status quo would be detrimental to their interests. Accordingly it repeated the assurance that:[6]

> Her Majesty's Government will only decide on any major changes after full consultation with the representatives of the various communities in the Colony.

Subject to this, the British Government felt that it was unrealistic to suppose that the status quo could be maintained indefinitely.

Then in November 1962, it was announced that the Under Secretary of State, Mr Nigel Fisher, hoped to visit Fiji in early 1963 and expected to learn of the views of all sections of the community on the future of the Colony. The Governor expressed

---

5 Address of the Governor of Fiji in the Legislative Council: Council Debates (1962), 500.

6 Idem.

7 Idem.

the wish that all sections of the community should give consideration to the issues and make their views known to the Under Secretary of State.[8] His proposed visit led to speculation on the intentions of the British Government towards constitutional changes. In spite of the various assurances given, both outside and inside the Legislative Council, the Fijians were still unsure of their position in relation to imminent constitutional changes. In fact the latest assurance had been given as recently as 23 November 1962 - that is in the opening address of the Governor in the Legislative Council.[9] In December 1962, the following motion was moved and seconded by Fijian members:[10]

> That in view of the expressed and representative desire of the Fijian people and having due regard to His Excellency the Governor's address at the opening of the present session, this Council takes cognisance of the wish of the Fijian people that there should be no change in the present Constitution of the Colony until the Fijian people express their desire for further Constitutional changes.

This motion was introduced as was expressly acknowledged, to get a "reaffirmation" of the position of the Fijians. According to the Fijians there were grave doubts as to their future.

> There have been doubts expressed in recent years, doubts which have been created in the minds of the Fijian people because of recent developments in other territories, because they see a sort of broad conflict between assurances given to us from time to time and what we think is pressure brought about by high-power politics as to our future in this country.[11]

---

8 Idem.

9 Idem.

10 Council Debates (1962), 625.

11 Ibid., 626. per Mr. Ravuama Vunivalu.

The substance of the motion seems to have been unanimously accepted in that almost all agreed that no major constitutional changes ought to come about against the wishes of the people as a whole. However, there was objection from the Indian members to the racial connotations and form of the motion. This motion, as it stood, was agreed to with the Indian members voting against it.

In the meantime in March 1963 an important constitutional change was made by the Fiji (Constitution) Order in Council 1963 which came into effect on 1 March 1963. By the Order, the Legislative Council was to consist of six unofficial members of each of the three principal racial groups, the Fijians, Indians and Europeans. Four members of each of the races were to be directly elected by the people, two Indians and two Europeans were to be nominated by the Governor, and two Fijians elected by the Council of Chiefs. This Order in Council was the first major constitutional change since 1937. For the first time the Fijian people were able to elect their representatives directly and for the first time the franchise was extended to women and to all literate adults regardless of property qualifications.[12] Though there was an increase in the number of elected members to eighteen, the official majority of nineteen members was retained.

On the international scene there was strong criticism of the English colonial policies including their effect on Fiji. There was a debate about Fiji in the United Nations Special Committee

Pro Pg 86

---

12 Fiji (Constitution) Order in Council, 1963 : ss. 25,30 & 32.

on Colonialism. In 1963 and 1964 there were resolutions, calling on Britain to take immediate steps to hand over power unconditionally to the people of Fiji.[13]

In January 1963, the Under Secretary of State, Mr Nigel Fisher, visited Fiji and he held discussions about the constitutional future of Fiji. During his visit, the members of the Fijian Affairs Board addressed a letter, dated 17 January 1963, to the Under Secretary further outlining the Fijian objections to constitutional changes without the necessary safeguards. Fijian members represented that the terms of the Colony's special relationship with Britain, which was felt to have its closest parallel in the constitutional links between Britain and the Channel Islands or the Isle of Man, should be clarified and contained in legislation. Their view was that, if these issues could be satisfactorily resolved, they would be prepared to go along with further moves towards self government. However, the British Government felt that the time for change was coming. In a despatch dated 15 August 1963 to the Governor of Fiji, the Secretary of State for the Colonies made the position of the British Government quite clear when he stated:[14]

> The British Government accept that the time is approaching when the future relationship between Fiji and Britain should be clarified and codified, and will be glad, in consultation with representatives of the people of Fiji, to work out a constitutional framework which will preserve a continuing link with Britain and within which further progress can be made in the direction of internal self-government.

---

13 Pacific Islands Monthly, August 1965, 64.

14 (1963) Fiji Royal Gazette 309.

It was clearly indicated by the British Government that in 1964 or early 1965, a constitutional conference was to be held in London with a view to reaching agreement between the British Government and the leaders of the representative opinion in Fiji.

In the meantime the British Government desired that some advance be made to increase internal self-government. Fiji was seen to have leaders well qualified to bear added responsibilities. Accordingly, the British Government wished to introduce the "Member System" in accordance with its previous proposals of 1961.[15] This, of course, did not necessitate amendment of the existing constitutional instruments. The above mentioned despatch of the Secretary of State was the subject of much discussion and deliberation in Fiji.

In 1963 the Great Council of Chiefs resolved to accept this despatch from the Secretary of State as a basis for negotiation on the subject of constitutional changes. However, the Council of Chiefs sought an assurance from the British Government that the points raised in paragraph five of the letter of the Fijian Affairs Board to Mr Nigel Fisher would be safeguarded.[16]

---

15 Council Paper No. 8 of 1961; see p.79 , ante.

16 Paragraph 5 of the letter read:

> The provision in the Fijian Affairs Ordinance that all legislation affecting Fijian rights and interests should be referred to the Fijian Affairs Board or, on the recommendation of the Board, to the Council of Chiefs, should be retained and likewise theGovernor's directions through the Public Service Commission to work towards the balance of the races in the Civil Service.

For a full text of the letter see Council Debates (1965), 752 - 753.

Further, the Council of Chiefs desired that there be consultations amongst the representatives of all racial groups prior to the Conference in Britain. Accordingly in January 1964, a Fijian elected member Ratu K. K. T. Mara (as he then was) moved:[17]

> That this Council takes note of the Secretary of State's despatch No. 388 of the 15th August, 1963, the text of which is as follows: .... [The text omitted] and agrees that in the light of the assurances given by Her Majesty's Government in the United Kingdom in the said despatch a 'Member System' within the framework of the 1963 Constitution should be introduced as soon as is practicable.

In so moving, he was very careful to say that:

> The motion of course, does not spell out any constitutional change.

The motion was seconded by an Indian member. This motion was unanimously adopted. Consequently one Member was appointed from each of the three races. They were:-

(a) Ratu K. K. T. Mara (as he then was): Member for Natural Resources, (a Fijian).

(b) Mr A. D. Patel: Member for Social Services, (an Indian).

(c) Mr J. N. Falvey: Member for Communication and Works, (a European).

In the meantime an organized political party called the Federation Party (later the National Federation Party) was formed in 1964.

---

17 Council Debates (1964), 5.

The nucleus of the party was established after the 1960 sugar cane strike. It was headed by Mr A.D. Patel and among the initial strong supporters were Messrs S.M. Koya, James Madhavan, and C.A. Shah, This party was predominantly, if not entirely, Indian in membership at the time of its formation. Its objective was to press for the immediate adoption by the legislature of a common roll.

(5) 1965 - 1970

In February 1965, the British Government invited all unofficial members of the Legislative Council to a Constitutional Conference. The following month the Under Secretary in Charge of the Pacific and Indian Ocean Department of the British Colonial Office, Mr Trafford Smith, visited the Colony for talks with assocations and individuals about the future constitution.

His visit was followed by that of the British Parliamentary Under Secretary of State for the Colonies, Mrs Eirene White in April. The main purpose of her visit was to hear the views of those groups who would not have been directly represented at the proposed conference.

(a) The Pre-Conference Political Scene

The intention of the British Government was to have the three major races agree in broad terms on the issues to be discussed. The Governor held discussions with Legislative Council members to ascertain if agreement would be forthcoming. The Indian representatives were reluctant to give any definite undertakings. The Fijians refused to give undertakings until the Indians did so. Nonetheless there seemed to have been broad

agreement as to continuing the link with the Crown and continued United Kingdom responsibility for external affairs. Difficulties arose in relation to land and the introduction of a common roll. Eventually it was agreed that the question of Fijian lands should not be placed on the agenda for the forthcoming constitutional conference.

Voting System

On the method of elections and the common roll issue there was sharp disagreement. The Federation Party, headed by Mr A.D. Patel and supported by three other Indian Members of the Legislative Council, pressed for common roll which would give one man one vote. A meeting convened by the Governor, in March, of the leaders of each community broke up early when Mr A.D. Patel made it clear that he would not contribute anything to the discussions and whatever views he had would be expressed in London. The Fijians reacted by refusing to continue the discussions unless the Indians would. This was followed by a statement issued after the Federation Party's annual meeting at Lautoka when it was announced that the four unofficial Indian members of the Legislative Council who were in the Federation group would not hold any discussions on constitutional matters with other members of the Legislative Council. They would present their views in London. It was resolved by the Party that it was "inconceivable" that any good purpose would be served by holding any further discussions in Fiji.

Subsequent to this, Mr A.D. Patel and his colleagues attended a meeting of the unofficial members of the Legislative Council and read a statement advocating the introduction of common roll. The four members then confirmed their directive from the Party not to hold any further discussions in Fiji. However,

the other remaining members - six Fijians, six Europeans and two Indians - decided to hold meetings amongst themselves and agreed to attempt to prepare a considered policy for London.

It must be pointed out that not all of the Indians supported Mr Patel and his views. There were many who were opposed to Mr Patel. The Kisan Maha Sang and the Kisan Sangh (which were farmers' associations), the Indian Association and the National Congress were uncompromisingly opposed to Mr Patel and his Party. This was demonstrated clearly at a meeting held on the 25 June between members of the National Congress of Fiji, and Fijian and European members of the Legislative Council. The Indians at the meeting condemned the actions of Mr Patel and his group in refusing to co-operate with other Council members in an effort to work out a pre-conference solution.

On the Fijian political stage, there was strong opposition to Mr Patel and his Party's attitude. It was so strong that the Fijian Democratic Party - headed by a trade unionist, Mr Apisai Tora - declared[18] "Fiji for the Fijians". It also condemned the common roll. Mr Tora went to the extent of saying that Indians must leave Fiji. The Great Council of Chiefs also met in Suva. The temper of the Fijians can be judged by a motion which was placed before the Council of Chiefs calling for the exclusion of the Indians from the constitutional talks in London. This motion was defeated by a narrow majority. Further, some individuals began to call for exclusion of both the Europeans and Indians from the constitutional talks, the basis being that when

---

18 Pacific Islands Monthly, July 1965, 13.

Fiji was ceded to the British Sovereign in 1874 the only parties were the Fijians and the British Government.[19]

The Europeans on the other hand, also wanted to secure their own positions. This could best be achieved by supporting the Fijians. They maintained that employment and income for Fiji's growing population was more important than political change for the sake of change or because of outside pressure. In April they released a memorandum containing these and other points. The memorandum, drawn up after wide-ranging discussions among the European electorate, put the European point of view on constitutional changes for Fiji. Drastic changes were opposed and very gradual changes were advocated. It strongly supported communal representation.[20]

With such an unsatisfactory atmosphere in Fiji there were grave apprehensions about the success of the London talks. Nevertheless, the Constitutional Conference was held from 26 July to 8 August. Before the Conference opened, general agreement had been reached in Fiji that independence was not an issue to be discussed. It was also agreed that all minority groups not then enfranchised should be included in the electoral rolls and that Muslims and other groups would not be separately represented.[21]

All sessions were held in private. Hence there are no

---

19 Pacific Islands Monthly, June 1965, 11.

20 Ibid., May 1965, 12.

21 Cmnd. 2783 (1965), 6.

official records of what transpired at the Conference,[22] apart from a white paper containing the report of the Conference, which was published in October.[23]

The Conference agreed that there should be a majority of elected members in the Legislative Council. The nomination of unofficial members was to be discontinued. Members of all minority groups, who hitherto had no vote, would be enfranchised and be eligible to stand for election. There was to be universal adult suffrage. Agreement was also reached on the introduction of ministerial responsibility and the inclusion of a Bill of Rights in the Constitution.

There was no agreement on the method of election to the Legislative Council. The majority of the Indian members continued to press for a common roll with appropriate safeguards. The Fijians and the Europeans strongly opposed this and advocated the retention of communal representation. They were prepared to accept a common roll as a long term objective. These diametrically opposed views as to the timing of the introduction of common roll could not be reconciled at the Conference.

Another matter on which divergent views were held was the proposal that there should be two more Fijian members of the legislature than Indian members. The European and Fijian groups maintained that the special position of the Fijians in Fiji justified

---

22 However, there is an unofficial account of what transpired: See Pacific Islands Monthly September, 1965, 147.

23 Cmnd. 2783, (1965).

two extra seats. The United Kingdom delegation also argued that since the Rotumans and other Pacific Island communities would be included in the Fijian electorate, additional seats were justified. The entire Indian delegation rejected this proposal and recorded their strong objection to it.

Ultimately the Conference reached its conclusions with various reservations noted. It decided that the Legislative Council would comprise thirty six elected and, at most, four official members. It was recommended that the elected members be chosen thus:

(a) Nine Fijians, nine Indians and seven Europeans would be elected on a communal roll.[24]

(b) Two Fijian members would be elected by the Council of Chiefs.

(c) Three members on each of the Fijian, Indian and European rolls would be elected by persons of all communities. This would give each elector a chance to elect a member of another community. This of course necessitated different constituency boundaries for the purposes of the election of these nine members and the country was divided into three different constituencies. This manner of voting was called "cross-voting".

Other recommendations referred to a Bill of Rights, the judicial system and the appointment of various commissions. These were not contentious matters.

objected too by the Fed Group in Solevuni

---

24 The Rotumans and other Pacific Islanders would be included in the Fijian roll and Chinese and all other communities on the same roll as the Europeans: Cmnd. 2783 (1965), 11.

(b) Post-Conference Era

After the Conference, there was strong disapproval by the Federation Group and other Indians of some of the proposals and recommendations. Mr Patel's group sent a letter to the British Secretary of State, Mr Greenwood, immediately after the Conference, warning that implementation of the London proposals "would create a grave racial disharmony leading to undesirable results".[25] The letter continued:[26]

> In this process an irreparable harm would be done to the country as a whole and we fear that the goodwill, harmony and understanding which has existed among all races in Fiji over the last ninety years would disappear forever.
>
> The responsibility for any course of events arising out of the implementation of these proposals and leading to this result should rest, in our view, on Her Majesty's Government.

Mr Greenwood, in reply, asked the authors of the letter to co-operate and warned that outright opposition was "far more likely to increase the suspicions of the other communities".[27]

In December 1965, a European member moved and a Fijian member seconded the following motion in the Legislative Council:[28]

> That in the opinion of this Council, the views of delegates to the Fiji Constitutional Conference as adopted by Her

---

25 Cited in Pacific Islands Monthly, November 1965, 9.

26 Idem.

27 Idem.

28 Council Debates (1965), 627.

Majesty's Government in a White Paper published in October, 1965 form a satisfactory basis for future political progress in Fiji along constitutional lines.

This motion was supported by a great majority of European and Fijian members and one Indian member and was objected to by the other five Indian members. Here again, the centre of controversy was the question of the common roll and the extra two seats for the Fijians. Five of the six Indian members held the view that the common roll should be introduced immediately but for obvious reasons the Fijian and European members objected to this course. After very lengthy discussions the Legislative Council formally adopted, as was expected, the recommendations made in the White Paper.

Both before and after the Constitutional Conference and the debates in the Legislative Council in 1965, the people of the Colony began to display a political awareness which was unthinkable a few years previously. There may perhaps be several reasons for this.

One reason is that hitherto the majority of the people relied on the Crown to govern the best way it thought fit. However, with the move towards self-government, people began to realise that very soon they would have to shoulder that burden. As well education was expanding and people, educated overseas, began to introduce ideas of "modern" democratic institutions. Further, people of all races recognised that for the protection of their respective rights and freedom, they would have to participate actively and organize themselves in groups. Needless to say, some also felt that the best way to become future leaders of the

country was to organise political parties hoping eventually to have their ideas adopted by the electorate.

(c) The Fijian Political Parties

The Fijians' first political party, the Fijian Association, was formed in 1956. In its initial stages it was not a very active political association. However, from the early 1960's it began to gain momentum. It became more influential when more Chiefs began to support it.

The next political party, the Fijian Democratic Party, was created in 1961 and has already been mentioned. The leader of this party was a trade unionist, Mr Apisai Tora. In the beginning this party gave the impression that it opposed the chiefly traditions. In the 1963 elections it received a very severe blow and lost much of its support. It was this party which in 1965 began to advocate "Fiji for the Fijians" and declared that the "Indians must go". (Ironically, the then leader of the party, Mr Apisai Tora, is now a member of the predominantly Indian party, The National Federation Party.) It was eventually dissolved.

There also emerged during 1964 the Fijian Advancement Party. One of its few achievements was the protest march against Sunday trading on 9 December 1966, but as a political party it simply faded away.

Later there was a fourth party - the National Independent Party. This party too did not enjoy much success and had very little support. It was doomed to failure from the beginning as

was evident from the report that at its meeting on 22 January 1966, only about thirty Fijians and three Indians turned up.[29]

(d) The Indian Political Parties

The first political party among the Indians was the Indian Association of Fiji. It was formed in the early thirties. It is still in existence, but it plays little part in politics.

As has been seen[30] the nucleus of the present National Federation Party was formed after the historic sugar cane strike in 1960. Initially, this party was predominantly an Indian party but it later gained the confidence of some Fijians and others. It claims, justifiably, to be a multi-racial party, membership being open to persons of all races.[31] From its inception it has been a very active political party playing a major role in constitutional developments in Fiji, including the establishment of the 1970 Independence Constitution. It is now the Opposition Party in the House of Representatives in Fiji.

Next there emerged the National Congress of Fiji. This party was formed to counteract the influence of Mr A.D. Patel and the Federation Party. The Congress was headed by Mr Ajodhya Prasad but it had very little success politically.

The Fiji Muslim League began as a political association

---

29 Pacific Islands Monthly, March 1966, 29.

30 See p.89 , ante.

31 It commands the support of fourteen Indians (including the Leader of the Opposition), three Fijians and one Chinese in the House of Representatives of the Fiji Parliament.

in the late twenties. The League is no longer a political party and survives only as a religious body. Later there was the Muslim Association which was formed in the early forties. It was headed by a prominent Muslim figure, Mr A.R. Sahu Khan.[32] This Association put up a very strong case for separate Muslim representation but without success. One of the major reasons for its failure was the opposition it met from the Fiji Muslim League leaders. The Association too has become a religious body. As well there were two very insignificant political parties - the Fiji Minority Party and the All Fiji Muslim Front. Both of these had very little support from the bulk of the Muslim community.

(e) The European Political Parties

In Fiji the Europeans enjoyed a great advantage over the Indians and the Fijians in terms of political experience. They participated in the constitutional development of Fiji from the beginning of colonial rule and secured their first elective representation in 1904. Hence by the time the Indians and the Fijians secured elective representation in the legislature, Europeans had been able to consolidate their position in the political field. There was not much political rivalry amongst the Europeans in Fiji. They were able to present a common front to a greater degree than the other two major races particularly the Indians. The European Electors Association of Fiji was formed well before the 1950's and had a very strong and united backing from the persons on the European electoral roll.

---

32 A nominated member of the Legislative Council from 1944 - 1947.

When the half-castes appeared as a significantly numerous community, they formed the Part-European Association. Though included in the "European" roll, half-castes outnumbered the Europeans. When the 1966 Constitution required all communities, other than those which were included in the "Indian" or "Fijian" roll, to be included in the "General" roll that roll included the Europeans, the Chinese, the half-castes and other non-Fijians and non-Indian groups. This led to the formation of the political party called the General Electors Association early in 1966.

(f) The Alliance

By January 1966 there was a move to set up a multi-racial political alliance of organizations and individuals. A steering committee representing members of Fiji's Fijian, Indian, European and Chinese communities had been formed. This was the nucleus of what later became the Alliance Party. The Alliance Party was formed not as a political party of individuals but more as an alliance of organizations. It was a "Party" which recognized racial distinctions. Thus to be a member of the Alliance Party one has to be a member of one of the organizations which is affiliated to the Alliance Party. Today the General Electors Association, the Fijian Association and the Indian Alliance are the three major organizations which constitute the Alliance Party.

The Europeans and the Fijians gave whole-hearted support to the Alliance Party but relatively little support for the Alliance came from the Indians. In fact, the writer is aware that in the early stages of the formation of the Alliance, some Indian members and supporters of the Alliance were embarrassed to declare openly their support for the party. Amongst the Indians, rightly

or wrongly, the common attitude was that the Indian supporters of the Alliance were puppets and stooges of the Europeans and Fijians.[33]

By way of summary it may be said that of all the various political parties that had emerged by the 1966 Constitution or soon thereafter the two major parties were the Alliance and the Federation (which became the National Federation Party). This is evident from the results of the first election under the 1966 Constitution in September 1966. Of the thirty-four candidates elected directly by the people twenty-four seats were secured by the Alliance, nine by the Federation and one went to an independent candidate[34] (who declared openly that although he was an independent candidate he supported the Alliance policy).

(g) The 1966 Constitution

The 1966 Constitution established an unofficial majority in the Legislative Council. After the elections, as has been seen, there were two major political parties represented in the Legislative Council - the Alliance and the Federation. The Alliance commanded the substantial majority and hence it formed the "Government". A new post was created called the "Leader of Government Business" which was equivalent to the prime ministership and appointed on the same principle as the appointment of a prime minister in England. The Leader of Government

---

33 Hence in the first general elections in September, 1966 under the 1966 Constitution the Alliance candidates got only 15.7 per cent of Indian votes: Pacific Islands Monthly, November 1966, 11.

34 Mr Charles Stinson. He is now the Minister of Finance.

Business also headed the Executive Council or "Cabinet" which continued to be appointed by the Governor.

On 1 September 1967, the full ministerial system was introduced for the first time in Fiji. Under this the Leader of Government Business became the Chief Minister (Premier) and the "Members" became Ministers with the Governor retaining the right of veto. The Executive Council was replaced by the Council of Ministers (equivalent to a Cabinet) with the Governor as its President.

There was also created the position of the Leader of the Opposition.

(h) The 1967 Walk Out

The Federation Party continued its pressure for the immediate introduction of common roll, a move which the Alliance Party, with a substantial majority in the Legislative Council, strongly opposed. In spite of the new Constitution the United Nations Special Committee on Colonialism did not modify its attitude towards Fiji and in 1967 the United Nations Organization announced that a fact-finding mission would be sent to Fiji. This aroused strong opposition from the Fijians generally and the Alliance Government in particular. Thus in the Legislative Council Ratu K.K.T. Mara (as he then was) who was then the Leader of Government Business emphatically stated in the Legislative Council that as far as the Government was concerned the visit was not welcome.[35] MP for Fed Party walked out in protest.

---

35 Council Debates (1967), 176.

On 1 September 1967, the Leader of the Opposition, Mr A. D. Patel, introduced a motion in the Legislative Council condemning the Constitution as "Undemocratic, iniquitous and unjust" and calling for a "Constitutional Conference immediately to ensure that a new Constitution is worked out based on true democratic principles....".[36] As might have been expected, this motion was very strongly opposed by the Alliance members. The opening speaker for the Alliance Group was Mr Vijay R. Singh, an Indian. The latter recalled the non-co-operative attitude of Mr A. D. Patel and his colleagues during the pre-conference talks. He also adverted to the issue of the non-enlistment of Fiji Indians in the 1939 - 45 war.[37] This prompted very strong protests from

---

36 Ibid., 612. The full text of the motion was:

> Undemocratic, iniquitous and unjust provisions characterize the existing Constitution and electoral laws of Fiji and their operation have caused alarm in the minds of right thinking people and have hampered the political advancement of Fiji along democratic lines and this House therefore is of the opinion that Her Majesty's Government of the United Kingdom should call a Constitutional Conference immediately to ensure that a new Constitution is worked out based on true democratic principles without any bias or distinction on the grounds of colour, race, religion or place of origin or vested interest either political, economic, social or other so that Fiji may attain self-government and become a nation with honour, dignity and responsibility as soon as possible.

37 However, the true reason why the Indians in Fiji did not enlist during the Second World War was their protest against discriminatory pay between the Europeans and the other races. Mr A. R. Sahu Khan, who was an ex-sergeant in the Indian Platoon, has given a comprehensive account of the whole history on this subject: see Fiji Times, 18 March 1964. This account was cited with approval in the Legislative Council by Mr S.M. Koya: Council Debates (1965), 725 - 727.

the Opposition. Mr Vijay R. Singh then moved as an amendment to the original motion, that the 1966 Constitution:[38]

> correctly expresses the views of the great majority of the electors of all races in this country ... and ... the transition to a ministerial system of government less than ten months after the introduction of the 1966 constitution is plain evidence of the ability of the Alliance Government to govern the nation with honour, dignity and responsibility and on democratic principles.

As soon as this motion for amendment was accepted by the Speaker and the mover began to speak to it all the nine members of the Opposition walked out of the Chamber amidst shouts of "Cowards, cowards!" and "Shame on you". The members of the Opposition remained absent and eventually relinquished their seats; the country was ready for a by-election.

In the meantime there was much discussion in the country with the Opposition seeking to justify their walkout to their electorates and the government members, needless to say, attempting to condemn the walk out. The Chief Minister went to the extent of declaring:[39]

> I have no fear whatsoever in running this country without the Opposition.

The Federation Party issued a statement saying that the members had walked out in protest at the existing Constitution and the introduction of the ministerial system under it. The

---

38 Council Debates (1967), 624.

39 Council Debates (1967), 690.

statement claimed that they proposed to resort to non-co-operation. Public meetings were held all over the country. The Alliance also had several meetings. The Government published a detailed statement of the communications between the two parties over the previous ten months in order to discredit the Opposition.

In the meantime, the Chief Minister went on a world tour to acquaint himself with the way the ministerial system operated in countries where a similar system had recently been adopted. It was also reported [40] that the Chief Minister went to "sell Fiji's point of view" to the Committee of Twenty Four of the United Nations which wanted to send a mission to the Colony to see why it was not getting independence. He met with little success in this respect.

The stage was set for a by-election for all nine seats of the Opposition members. Before the by-election, one Opposition member, Mr M. T. Khan defected and filed his nomination as an Alliance candidate. The Federation Party opened its campaign with plans for independence. Its main policy was: [41]

> to work for immediate independence and to set up a democratic republic with a parliamentary government within the British Commonwealth.

Further, it was stated: [42]

> In order to maintain a link with the past, a person who is

---

40 Pacific Islands Monthly, October 1967, 23.

41 Pacific Islands Monthly, August 1968, 20.

42 Idem.

ethnically a Fijian will be elected as the Head of State.

There was strong opposition to these policies.

The Alliance itself said that full self-government was inevitable but it favoured such a move by an "ordered and systematic handover of power", and not with "chaos and anarchy in the streets".[43] At a Party Convention, the Chief Minister acknowledged that the Alliance itself was redrafting the Constitution to meet the needs of a self-governing Fiji. A resolution calling for more constitutional talks with Britain before the general elections in 1971 was also adopted by the Party.

The by-elections were held in September 1968 and the Federation Party was returned with greater majorities in practically all of the nine constituencies. This gave the Federation the strength to say that it represented at least the majority Indian voice inasmuch as these by-elections were in respect of Indian communal seats. Of the 59,786 Indians who voted, 46,960 voted for the Federation candidates.

This landslide victory of the Federation created much uncertainty in the minds of the Fijians. Mass meetings were held throughout the Colony where a disturbing emotionalism was exhibited, particularly in relation to the Federation Party's contention that it had a clear mandate to push for immediate independence and the adoption of a common roll. The Fijians' concern was accentuated by the fact that they felt that in matters of national importance, the Indians would be united. Hitherto, it had been thought that there was major disunity among the Indians.

---

43 Pacific Islands Monthly, September 1968, 21.

The Fijian Association held Colony-wide meetings. At its first meeting in Suva which was chaired by the present Governor-General, there were calls for the deportation of Indians and the return of land to Fijian hands. Topics with racial connotations were the major subjects at these meetings. There were also reports of disturbances in a few parts of the country. The Federation party blamed the Government and the Alliance supporters for all the resulting disturbances which it said were a face saving device for their "shock" defeat in the by-elections. Nevertheless, the Federation continued undaunted with its policy for the adoption of a common roll.

(i) 1970 Constitutional Conference

Relative calm followed the return of the Federation members to the Council. The next significant step in Fiji's constitutional development was the announcement, made by the Chief Minister in June 1969, that both the Alliance and the Federation would meet for discussions on a new constitution for Fiji. The date for a London Constitutional Conference was said to depend upon the measure of agreement reached at meetings in Fiji. However, most of these meetings had to be postponed in view of the sugar cane contract arbitration hearings. The death on 1 October 1969 of the Leader of the Opposition, Mr A.D Patel, caused the constitutional talks to be further delayed.

Mr S.M. Koya, who remains the present Leader of the Opposition, was elected as the new Leader of the Federation Party. On his election, Mr Koya stated that he favoured close consultations with the governing Alliance Party on pre-constitutional conference talks in Fiji. Surprisingly, by November 1969, within one month of the election of the new leader of the Opposition

Party, it was announced that both of Fiji's leading political parties had agreed to seek full self-government with Dominion status within the Commonwealth as the "most logical step" towards independence. The Alliance favoured full self-government with Dominion status, and the Opposition favoured independence as a republic. Nevertheless the Opposition was "happy" to accept the Alliance proposal. By late November most of the matters were generally agreed upon. All the meetings leading up to these announcements were of course held behind "closed" doors. There was much criticism of the secrecy but it fell on deaf ears.

1970 opened with another series of meetings between the two parties and in January official announcements were made that basic agreement had been reached. The most important agreement was the safeguarding of Fijian interests. It was agreed that this would be best achieved by the establishment of a Second Chamber. There was as yet no agreement on the electoral system or the manner of constituting the Upper House. At the end of January 1970, Lord Shepherd, the British Minister of State for Foreign Affairs arrived for discussions with the Government and Opposition on the formulation of a new status for Fiji. He met representatives of both political parties in complete privacy and secrecy. Again there was much criticism of the secrecy but no heed was taken. A report of Lord Shepherd's visit was presented to the Legislative Council on 25 February 1970. The Council, on the motion of the Chief Minister, seconded by the Leader of the Opposition, accepted the report. All members, except one,[44] formally endorsed the agreement that had been

---

44 Dr L. Verrier.

reached. The date for the next Constitutional Conference in London was set for 20 April, 1970.

The Conference took place from 20 April to 5 May. Again, all the business was conducted in private, despite popular disapproval of these secret talks on matters so vital to the country. There was no official information concerning what took place. It had been pointed out that it was wrong for Legislative Council members alone to represent the people at such a vital Conference. This was particularly so in view of the fact that the proposed constitutional arrangements had not been an issue at the previous election. It was argued that the Fiji delegates should have been elected by a convention in Fiji, called specially to deal with the constitutional issues.

Be that as it may, the Conference succeeded in agreeing on the terms of a Constitution for an independent Fiji. Finally on 10 October 1970, when the Constitution came into force, Fiji became an independent Dominion within the British Commonwealth.

PART THREE

THE CONSTITUTION

CHAPTER IV

THE GENERAL CHARACTERISTICS AND STRUCTURE

A. Introduction

A constitution is a set of laws and rules setting up the machinery of the government of a state. It invariably defines and determines the relations between the different institutions of government, namely the executive, the legislature and the judiciary. Most Commonwealth countries and indeed all those former colonies which achieved independence in the Commonwealth era have written constitutions. Fiji is no exception.

Whilst the 1970 Constitution of Fiji is the result of political negotiations and compromise, its provisions are not completely original. The framers of the Fiji Constitution drew directly on the constitutions of such African countries as Nigeria and Mauritius and any comparison will show striking similarities. Nonetheless there are, because of local factors, significant differences in the composition of the legislature and the methods of election.

Although the framers of the Fiji Constitution drew directly on the constitutional experience of the African countries in particular, the spirit and practice of the Westminster model have been influential. Both directly and derivatively, the constitution of Great Britain has influenced the Fiji Constitution. However, the basis of achieving the Westminster model has been different. For instance, as will be seen, some of the characteristic features of the Fiji Constitution are the supremacy of the Constitution (as opposed to the sovereignty of parliament),[1] constitutional guarantees of fundamental rights,[2] judicial review of the constitutionality

---

1 See pp. 210 et seq., post.

2 See pp. 427 et seq., post.

of legislation,[3] the transfer of the responsibility for terminating a judge's tenure of office from a legislative to a judicial forum,[4] and the vesting of full control over the public service and the conduct of elections in the hands of independent commissions.[5] Although the English constitution has no specific provisions relating to the matters just mentioned, most of these provisions follow the spirit and practice of British institutions.[6] The framework of the executive and the legislature in Fiji follow the Westminster model very closely. At Westminster

> the head of state is not the effective head of government; in which the effective head of government is a Prime Minister presiding over a Cabinet composed of Ministers over whose appointment and removal he has at least a substantial measure of control; in which the effective executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature; and in which Ministers are collectively and individually responsible to a freely elected and representative legislature.[7]

The Fiji Constitution has very similar framework. However, before examining the various important aspects of the Fiji Constitution, it is desirable to have a general view of its characteristic features and structure.

B. Legislature

The legislative function in Fiji is vested in the Parliament

---

3 See pp. 183 et seq., post.

4 See pp. 134 et seq., post.

5 See pp.140 et seq., post.

6 S.A. de Smith, The New Commonwealth and Its Constitutions (1964), 77.

7 Idem.

consisting of Her Majesty, a House of Representatives and a Senate.[8]

(1) The House of Representatives

The House of Representatives, like the House of Commons, predominates in the legislative field. The House consists of fifty two members elected to represent constituencies. But, unlike the United Kingdom or New Zealand, there are four electoral rolls. Voters are registered on one of three separate rolls, that is to say:[9]

(a) a roll of voters who are Fijians;[10]

(b) a roll of voters who are Indians; and

(c) a roll of voters who are neither Fijians nor Indians,

and all voters so registered are also registered on one additional roll called the "National roll".

The House comprises twenty two Fijians, twenty two Indians

---

8 Constitution, ss. 30 and 52.

9 Ibid., s. 32.

10 "Fijian" for the purposes of the Constitution is defined in s. 134 (a) as:

> A person shall be regarded as a Fijian if, and shall not be so regarded unless, his father or any of his earlier male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji or any island in Melanesia, Micronesia or Polynesia.

and eight others who are neither Indians nor Fijians. The election of the respective members of the various races is partly communal[11] and partly national.[12] The fifty two members of the House are elected as follows:[13]

(1) Twenty two members of the House are elected from among persons who are registered on the roll of voters who are Fijians, and of those members -

(a) twelve are elected by voters registered on that roll; and

(b) ten are elected by voters registered on the national roll.

(2) Twenty two members of the House are elected from among persons who are registered on the roll of voters who are Indians and of those members -

(a) twelve are elected by voters registered on that roll; and

(b) ten are elected by voters registered on the national roll.

(3) Eight members of the House are elected from among persons who are registered on the roll of voters who are neither Indians nor Fijians, and of those members -

(a) three are elected by voters registered on that roll; and

(b) five are elected by voters registered on the national roll.

Thus it will be seen that the representation in the House of Representatives is very unusual, possibly unique. The present

---

11 Only the members of a certain community elect members of that community; e.g. the Fijians elect the Fijian members and the Indians the Indian members.

12 That is where voters elect members irrespective of race or community e.g. an Indian voter can vote for a Fijian candidate. This will be similar to voting in the House of Representatives in Australia or House of Commons in the United Kingdom.

13 Constitution, s. 32.

form of representation although the result of hard political bargaining, nonetheless recognises the principle of adult suffrage of citizens.

At the first meeting following a general election the House of Representatives elects a Speaker and a Deputy Speaker from among its members.[14] Neither the Speaker nor the Deputy Speaker can be simultaneously a Minister or an Assistant Minister. The functions of the Speaker are very similar to those of the Speaker of the English House of Commons.

Unlike the English position, the determination of the question of membership of the House of Representatives is vested in the Supreme Court and not in the House itself.[15]

(2) The Senate

The Senate,[16] consists of twenty two members, of whom

(a) eight are appointed by the Governor-General acting in accordance with the advice of the Great Council of Chiefs;[17]

(b) seven are appointed by the Governor-General acting in accordance with the advice of the Prime Minister;

(c) six are appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition; and

---

14 Ibid., s. 36.

15 Ibid., s. 37.

16 Ibid., s. 45.

17 As to the history and composition of the Great Council of Chiefs see Ch. II, ante.

(d) one is appointed by the Governor-General acting in accordance with the advice of the Council of Rotuma.

A member of the House of Representatives is disqualified from membership of the Senate.[18] In addition to the other usual disqualifications, a person is disqualified from membership who had at any time during the immediately preceding three years held or acted in one of the offices specified.[19] The term of office of a member of the Senate is six years and his tenure is not affected by a dissolution of Parliament.[20] Parliament is dissolved at the expiration of five years. The basic qualifications for all Senators are similar to those for membership of the House of Representatives - that is citizenship, non allegiance to foreign nations, not disqualified by bankruptcy, unsound mind and so forth.

The Senate, at its first meeting elects, a President and a

---

18 Constitution, s. 46 (2) (a).

19 The offices are the Constituency Boundaries Commission, the Electoral Commission, the Judicial and Legal Services Commission, the Public Service Commission or the Police Service Commission or the office of Supervisor of Elections or Ombudsman; Constitution s. 46 (2) (h).

20 Ibid., s. 47. However, the first members of the Senate were not all appointed for six years. The following were only appointed for three years:

(a) four appointed under advice of Great Council of Chiefs,

(b) three appointed under advice of the Prime Minister,

(c) three appointed under advice of the Leader of the Opposition, and

(d) The member appointed under advice of Council of Rotuma.

Vice President, neither of whom can be a Minister or Assistant Minister. They discharge duties corresponding to those of the Speaker and Deputy Speaker of the House of Representatives.

(3) Her Majesty

The Queen is an integral part of Parliament in Fiji and her functions are exercised by the Governor-General. When a bill has been passed by the House of Representatives it is sent to the Senate. After the bill has been passed by the Senate and agreement has been reached between the two Houses on any amendments made to it by the Senate, it is then presented to the Governor-General for assent.[21] However, if the bill falls within sections 62, 63, 64 or 65 of the Constitution it may be presented to the Governor-General for assent irrespective of the views of the Senate.[22] When a bill is presented to the Governor-General for assent, he signifies that he assents or that he withholds assent.[23] When the Governor-General assents to such a bill, it becomes law and the Governor-General causes it to be published in the Gazette. No law comes into operation until it has been published in the Gazette.[24]

---

21 Constitution, s. 53 (3). As to the appointment of the Governor-General and the exercise of functions by the Governor-General generally see Ch. XVI, post.

22 Idem. As to the limitations of the powers of the Senate under ss. 62, 63, 64 and 65, see p. 123 , post.

23 Constitution, s. 54 (4).

24 Ibid., s. 53 (5) and (6).

C. The Exercise of Legislative Functions

(1) Sessions, Prorogation and Dissolution of Parliament

The commencement of each session of Parliament is determined by the Governor-General. However, the time appointed for the commencement of any session of Parliament must be such that a period exceeding six months does not intervene between the end of one session and the first sitting of Parliament in the following session. The Governor-General may summon a session if he receives a request in writing for the summoning of a session of Parliament from not less than one quarter of the members of the House of Representatives and he considers, in his own deliberative judgement, that the Government no longer commands the confidence of a majority of the members of that House or that it is necessary for the two Houses of Parliament to consider without delay a matter of public importance. Otherwise, the sitting of each House of Parliament takes place at such time and place as that House may, by its rules of procedure or otherwise, determine.[25]

As to prorogation and dissolution of Parliament, the Governor-General, acting in accordance with the advice of the Prime Minister, may at any time prorogue or dissolve Parliament.[26] However, if the House of Representatives passes a resolution of no confidence in the Government, and the Prime Minister does not either resign from his office within three days or advise the Governor-General to dissolve Parliament within seven days, or at such later time as the Governor-General,

---

25 Ibid., s. 69.

26 Ibid., s. 70 (1).

acting in his own deliberate judgement, may consider reasonable, the Governor-General acting in his own deliberate judgement, may dissolve Parliament. Also, if the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the Governor-General, acting in his own deliberate judgement, may dissolve Parliament.[27]

Under normal circumstances, the life of Parliament is five years; but if at any time Fiji were to be at war Parliament has the power from time to time to extend the period of five years by not more than twelve months at a time, provided that the total period of extensions does not exceed five years.[28] Also, if the Governor-General has declared by proclamation that a state of public emergency exists, Parliament may extend its life by not more than six months at a time provided that the total period of extensions does not exceed twelve months.[29] Furthermore, if after dissolution and before the holding of the next following general election, the Prime Minister advises the Governor-General that, owing to the existence of a state of war or of a state of emergency in Fiji, it is necessary to recall Parliament, the Governor-General shall summon the Parliament that has been dissolved.[30] This of course would not stop the

---

27 Idem.

28 Ibid., s. 70 (3).

29 Ibid., s. 70 (4).

30 Ibid., s. 70 (5).

scheduled elections. The Parliament so summoned, unless dissolved sooner, shall stand dissolved on the day before the day prescribed for polling at that election.[31]

(2) Parliamentary Powers

Parliament has the general power, subject to the provisions of the Constitution, to make laws for the peace, order and good government of Fiji.[32] It is in this field of parliamentary powers that the Fiji Constitution differs drastically from the constitutional arrangements in the United Kingdom.[33] As will be seen later, sovereignty of Parliament as Dicey understood the term has relatively little application to Fiji. In Fiji there is supremacy of the Constitution as opposed to supremacy of Parliament.[34] There are various fetters to the powers of Parliament in Fiji.[35]

The law as to parliamentary privilege is also very different in Fiji from the position in the United Kingdom. Parliament in

---

31 Ibid., s. 70 (6).

32 Ibid., s. 52.

33 This matter relating to the difference between the two constitutional set ups is dealt with in greater detail in part IV; see pp. 210 et seq., post.

34 S. 2 expressly declares the supremacy of the Constitution. This matter is dealt with in greater detail in Part IV, see pp. 210 et seq., post.

35 See pp. 206 et seq., post.

Fiji has very few, if any, of the common law privileges of Parliament. Most of the privileges attached to the English Parliament have a statutory basis in Fiji.[36] At present, the Parliament in Fiji has no power to commit anyone for contempt. All such contempt matters are subject to ordinary criminal prosecution in a court of law.[37] However, the Constitution does provide that each House of Parliament may regulate its own procedure and may make rules for that purpose, including in particular the orderly conduct of its own proceedings.[38]

(3) Parliamentary Procedure

Each House is empowered to regulate its own procedure. However, there are some constitutional requirements which must be complied with. The power of Parliament to make laws is exercised by bills passed by both Houses of Parliament except, as will be presently seen, in respect of appropriation and other money bills, and certain urgent bills. A bill may originate only in the House of Representatives.[39] When a bill has been passed by the House of Representatives, it is sent to the Senate. When it has been passed by the Senate and agreement has been reached between the two Houses on any amendment made to it by the Senate, the bill is presented to the Governor-General for assent.[40]

---

36 They are contained in The Parliamentary Powers and Privileges Ordinancy 1965: Ordinance No. 26 of 1965.

37 On this subject, see pp. 289 et seq., post.

38 Constitution, s. 54.

39 Ibid., s. 53 (2).

40 Ibid., 53 (3).

(a) Financial Measures

Except upon the recommendation of the Cabinet signified by a Minister, neither the House of Representatives nor the Senate can deal with any motion or bill (including any amendment to a bill) that makes provision for:[41]

(a) the imposition or alteration (otherwise than by reduction) of taxation;

(b) the imposition or alteration (otherwise than by reduction) of any charge upon the Consolidated Fund or any other public fund of Fiji;

(c) the payment, issue or withdrawal from the Consolidated Fund or any other public fund of Fiji of any moneys not charged thereon or any increase in the amount of such payment, issue or withdrawal; or

(d) the composition or remission of any debt to the Government.

Whether the bill or motion deals with any of the above matters is decided by the person presiding.[42]

If an appropriation bill has been passed by the House of Representatives and is not passed by the Senate without amendment by the end of the second day of its receipt, the bill shall, unless it is otherwise resolved by the House of Representatives, be presented to the Government-General for assent.[43] Whether it is an appropriation bill shall be determined by the Certificate of

---

41 Ibid., s. 61.

42 Idem.

43 Ibid., s. 62.

the Speaker.[44]

Also, if the Senate does not pass without amendment a non-appropriation bill which has been passed by the House of Representatives and certified by the Speaker as a money bill[45] within 21 days of its receipt, the bill shall, unless the House of Representatives resolves otherwise, be presented to the Governor-General for assent.[46]

(b) Urgent and Other Bills

If the Governor-General, acting in accordance with the advice of the Prime Minister, certifies in writing to the President of the Senate that the enactment of a bill that has been passed by the House of Representatives is a matter of urgency and the bill has been sent to the Senate at least seven days before the end of the session, and if within seven days of its receipt the Senate has either not passed it or has passed it with an amendment to which the House of Representatives does not agree, the bill, unless the House of Representatives otherwise resolves, shall be presented to the Governor-General for assent. This however, does not apply to any bill falling under sections 67 and 68 of the Constitution.[47]

If any bill (other than those falling under sections 62,[48] 63,[49]

---

44 Idem.

45 As defined by s. 63 (3).

46 Ibid., s. 63 (1).

47 S. 64.

48 See n. 41 p. 122, ante.

49 See nn. 45 and 46, ante.

64,[50] 67[51] and 68[52]) has been passed by the House of Representatives in two successive sessions and in each case has been sent to the Senate at least one month before the end of the session, has been rejected by the Senate in each of those sessions, that bill shall, on its rejection by the Senate for the second time, unless the House of Representatives otherwise agrees, be presented to the Governor-General for assent. However, in such a case at least six months must have elapsed between the date on which the bill is passed by the House of Representatives, in the first session and the date on which it is passed by that House in the second session.[53]

It is apparent that the Senate has very limited powers in

---

50 See n. 47 ante.

51 This section concerns amendments to the following provisions of the Constitution:

(a) Chs. I, II, III, VII, VIII and IX (including schedules 2 and 3),
(b) Ss. 27, 28, 30, 31, 42 - 45, 52, 53, 67 - 70, 72, 78, 85, 124 and 126,
(c) Ch XI to the extent it relates to any of the provisions specified above.

52 This section covers bills altering any of the following laws:

(a) The Fijian Affairs Ordinance,
(b) The Fijian Development Fund Ordinance 1965,
(c) The Native Lands Ordinance,
(d) The Native Land Trust Ordinance,
(e) The Rotuma Ordinance,
(f) The Rotuma Lands Ordinance,
(g) The Agricultural Landlord and Tenant Ordinance,
(h) The Banaban Lands Ordinance and
(i) The Banaban Settlement Ordinance.

53 Constitution, s. 65.

relation to the bulk of the legislation in Fiji. It is only in relation to the amendment of most of the provisions of the Constitution and certain specified enactments,[54] that the Senate has any effective power or role to play.[55]

(4) The Royal Assent

When a bill has been passed (dealt with) by the House of Representatives and the Senate under the provisions of the Constitution, it is then presented to the Governor-General for assent.[56] When a bill is so presented to the Governor-General for assent, he signifies that he assents or that he withholds assent.[57] When the Governor-General assents to such a bill, it becomes law and the Governor-General causes it to be published in the Gazette. However, no law comes into operation until it has been published in the Gazette.[58]

D. The Executive

The executive authority of Fiji is vested in Her Majesty

---

54 See nn. 51 and 52, p. 124, ante.

55 Matters pertaining to the Senate are dealt with in greater detail in Ch. XVII, post.

56 Constitution, s. 53 (3).

57 Ibid., s. 54 (4); as to this section and the exercise of functions by the Governor-General generally, see Ch XVI, post.

58 Constitution, s. 53 (5) and (6).

whose powers are exercised by the Governor-General either directly or through officers subordinate to him.[59]

The functions of the executive are carried on under the ministerial system. The Constitution provides for a Prime Minister, an Attorney-General and such other Ministers of the Government as the Governor-General, acting in accordance with the advice of the Prime Minister, may establish. The Governor-General, acting in his own deliberative judgement, appoints as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the majority of the members of that House.[60] Other Ministers are appointed by the Governor-General acting in accordance with the advice of the Prime Minister.

(1) The Cabinet

(a) General

The Cabinet is patterned on the United Kingdom Cabinet system. In theory the function of the Cabinet is to advise the Governor-General as to the government of Fiji. However, in practice the real power within the nation resides in the Cabinet.

The Cabinet in Fiji consists of the Prime Minister and such of the other Ministers as the Prime Minister may from time to time designate.[61] The Cabinet is collectively respon-

---

59 Ibid., s. 72. As to the exercise of functions by the Governor-General generally see Ch. XVI, post.

60 As to the tenure of office of the Prime Minister and other Ministers, see pp. 128 et seq., post.

61 At present in addition to the Prime Minister the Attorney-General and Deputy Prime Minister there are 11 Ministers and 7 Assistant Ministers.

sible to Parliament for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.[62] This means that the Cabinet must speak with one voice on all questions of policy and if a member disagrees with his colleagues he must resign. The Cabinet is not responsible for the following:[63]

(a) the appointment and removal from office of Ministers and Assistant Ministers, the assigning of responsibility to any Minister under the powers conferred on the Governor-General under Section 76 of the Constitution or the authorization of another Minister to perform the functions of the Prime Minister during illness or absence;

(b) the dissolution of Parliament; and

(c) the exercise of the prorogative of mercy.

It is the responsibility of the Prime Minister to keep the Governor-General fully informed concerning the general conduct of the Government of Fiji and he must furnish the Governor-General with such information as the latter may request with respect to any particular matter relating to the Government of Fiji.[64]

There is no requirement in the Constitution as to a Minister being a member of the House of Representatives (an elected body) or a member of the Senate (a nominated body). A Minister

---

62 Constitution, s. 75 (2).

63 Ibid., s. 75 (3).

64 Ibid., s. 79.

can be appointed from either House of Parliament.[65]

(b) Appointment of The Cabinet

The Governor-General, as has been seen, appoints the Prime Minister. The Prime Minister then selects all other members of the Cabinet from among the members of either House. In practice a great majority of the members of the Cabinet are selected from members of the House of Representatives. The Prime Minister then advises the Governor-General who makes the ministerial appointments. It is possible for all members of the Cabinet to be appointed while Parliament is dissolved but they must come from either of the last Houses of Parliament and their continuance in office is contingent upon their being members of either House of the new Parliament, and in the case of the Prime Minister, the House of Representatives.[66] The Prime Minister can retain in his Cabinet a member of the House of Representatives who fails to secure re-election by appointing him to the Senate should there be a vacancy.

(c) Termination of Cabinet Appointments

The services of a Cabinet as a whole can be terminated (besides of course the voluntary resignation of the Prime Minister and the other Ministers) in two ways. First, if a resolution of no confidence in the Government is passed by the House of Representatives and the Prime Minister does not within three days

---

65 In fact the present Deputy Prime Minister, Ratu Sir Penaia K. Ganilau, was in 1971 appointed as the Minister of Defence and later the Minister for Home Affairs, Lands and Mineral Resources when he was a member of the Senate. Also the present Attorney-General, Mr J. N. Falvey, is a member of the Senate.

66 Constitution, s. 73 (2).

resign from his office, the Governor-General shall remove the Prime Minister from office unless, in pursuance of section 70 (1) of the Constitution, Parliament has been or is to be dissolved in consequence of such a resolution.[67] If the Prime Minister resigns from office after the passage by the House of such a resolution of no confidence in the Government or is removed from office as aforesaid, the offices of all other ministers become vacant.[68] Secondly, if at any time between the holding of a general election and the first sitting of the House of Representatives thereafter the Governor-General, acting on his own deliberative judgement, considers that, in consequence of changes in the membership of the House resulting from that general election, the Prime Minister will not be able to command the support of a majority of the members of the House, the Governor-General may remove the Prime Minister from office.[69] When the Prime Minister is so removed, the offices of all other Ministers automatically become vacant.[70]

Thus, the removal of the Prime Minister can only be effected by the bringing down of the Government although he, (like all other Ministers and Assistant Ministers) may resign his office. On the other hand, the other Ministers and Assistant Ministers hold their appointments formally at the pleasure of the Governor-General who of course acts on the advice of the Prime Minister.[71]

---

67 Ibid., s. 74 (1).

68 Ibid., s. 74 (5) (d).

69 Ibid., s. 74 (2).

70 Ibid., s. 74 (5) (d).

71 Ibid., s. 74 (5) (c).

Hence the tenure of office of the other ministers is at the pleasure of the Prime Minister.

(2) The Prime Minister

The Prime Minister of Fiji occupies a very important position not only in the legislative and executive field but in a number of other important areas specified in the Constitution. The Constitution creates the office of Commissioner of Police who is in command of the Police Force. The Prime Minister may give to the Commissioner of Police such general directions of policy with respect to the maintenance of public safety and public order as he may consider necessary and the Commissioner is bound to comply with such orders.[72]

Appointment to certain other offices is in the hands of the Governor-General, e.g. the Chief Justice, Ambassadors, High Commissioners and other principal representatives of Fiji in any other country, and the Ombudsman. However, the Governor-General can only make such appointments after consultation, inter alia, with the Prime Minster.[73]

Appointment to other public offices are vested in the various Commissions, e.g. the Judicial and Legal Services Commission. However, an appointment to certain other public offices[74] cannot be made without consultation with the Prime Minister (and the

---

72 Ibid., s. 84.

73 Ibid., ss. 90, 103 and 112.

74 E.g., The Central Agricultural Tribunal.

Leader of the Opposition).[75] Persons who are not citizens of Fiji (and who are not already public officers) cannot be appointed to certain public offices, unless the Prime Minister agrees.[76] Thus the Prime Minister wields very strong and effective influence over practically all governmental agencies.

E. The Leader of The Opposition

The Constitution expressly recognizes the office of the Leader of the Opposition,[77] who is appointed by the Governor-General. The person to be appointed the Leader of the Opposition is the leader of the opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party. If there is no such party, the Governor-General shall appoint the member of the House whose appointment would, in the judgement of the Governor-General, be most acceptable to the leaders of the opposition parties. However, if no such

---

75 Constitution, s. 102 (1).

76 I.e., Central Agricultural Tribunal,
Chief Registrar of the Supreme Court,
Deputy Registrar of the Supreme Court,
Assistant Registrar of the Supreme Court,
Solicitor General,
Crown Solicitor,
Chief Legal Draftsman,
Principal Legal Draftsman,
Senior Legal Draftsman,
Senior Magistrate,
First Class, Second Class and Third Class Magistrates,
Principal Legal Officer and
Legal Officer.

77 Constitution, s. 86.

person is found to be so acceptable, the Governor-General, acting on his own deliberate judgement, need not appoint a Leader of the Opposition.

The Leader of the Opposition also commands influence not only in the legislature but also in relation to certain appointments. Thus, the Governor-General or the relevant Commission has to consult the Leader of the Opposition in appointing the Chief Justice, the Ombudsman and certain other officers.[78]

F. The Judiciary

(1) General

The Constitution of independent Fiji made no significant changes in the judicial structure. The Constitution provides for a Supreme Court of Fiji with unlimited original jurisdiction to hear and determine any civil or criminal proceedings.[79] There is one Chief Justice of the Supreme Court and such other puisne judges as may be prescribed by Parliament.[80]

The Court of Appeal of Fiji[81] sits as an appellate court from decisions of the Supreme Court. The judges of the Court of Appeal are the Chief Justice, who is the President of the Court

---

78 Ibid., ss. 90, 104 (8), 105 (4), 106 (8), 109 (9), and 112.

79 Ibid., s. 89.

80 At present the prescription is for seven judges as prescribed by the Prescription of Judges (Amendment) Act 1972.

81 Constitution, s. 93.

of Appeal, such Justices of Appeal as may be appointed and the puisne judges of the Supreme Court.[82] However, the Chief Justice and the puisne judges very rarely sit as appellate judges in local matters. They occasionally sit on appeals from the Solomon Islands or the Gilbert and Ellice Islands because the Fiji Court of Appeal is also the appellate court for those countries.

(2) The Appointment and Tenure of Office of Judges

(a) Supreme Court

The Chief Justice is appointed by the Governor-General, acting after consultation with the Prime Minister and the Leader of the Opposition.[83] The puisne judges are appointed by the Governor-General, acting after consultation with the Judicial and Legal Services Commission.[84] Temporary puisne judges may also be appointed in the same way as a puisne judge.

Judges of the Supreme Court are appointed until they attain retiring age. Under the Constitution, the retiring age is sixty two years but Parliament may prescribe a higher retiring age.[85] A Judge of the Supreme Court may be removed from office by the Governor-General for only two reasons:[86]

---

82 Ibid., s. 94.

83 Ibid., s. 90.

84 As to this Commission, see p. 137, post.

85 Constitution, s. 91 (7). At present the retiring age is 68 years, fixed by the Judges (Retiring Age) Act, s. 2: Act No. 60 of 1971.

86 Ibid., s. 91 (2).

(1) for inability to perform the functions of his office; or

(2) for misbehaviour.

The inability may arise from infirmity of body or mind or "any other cause". However, even in these two events, the removal by the Governor-General can only be made in accordance with the special procedure.[87]

Proceedings for the removal of a Judge are initiated by the Chief Justice or the Governor-General as the case may be. If the Chief Justice or, in relation to the removal of the Chief Justice, the Governor-General, considers that the question of removing a Judge of the Supreme Court for one of the two permissible grounds ought to be investigated, he appoints a tribunal which shall consist of a Chairman and not less than two other members, selected by the Governor-General from among persons who hold or have held high judicial office in some part of the Commonwealth or any other country that may be prescribed by Parliament.

The tribunal, after enquiring into the matter, shall report on the facts thereof to the Governor-General and advise the Governor-General whether he should request that the question of the removal of that Judge from office should be referred by Her Majesty to the Judicial Committee of the Privy Council under section four of the Judicial Committee Act 1933 or under any other such enactment in force enabling such a reference. If the tribunal so advises, the Governor-General shall request that the question be referred accordingly.

---

87 Ibid., s. 91 (3), (4) and (5).

If the question of removing a judge from office has been referred to a tribunal, the Governor-General may suspend the judge from performing the functions of his office pending the result of the proceedings. Such suspension may be revoked by the Governor-General at any time; but it will cease in any event under two circumstances. First, if the tribunal advises the Governor-General that he should not request that the question of the removal of the judge from office should be referred by Her Majesty to the Judicial Committee. Secondly, if the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.[88]

If the Judicial Committee advises for the removal of the judge concerned, the Governor-General shall remove the judge from office.[89]

(b) Court of Appeal

The Justices of Appeal are appointed by the Governor-General, acting after consultation with the Judicial and Legal Services Commission.[90]

A Justice of Appeal vacates his office upon the expiration of the period of his appointment to the office. Except in the case of the Justice of Appeal who, at the time of his appointment also holds office as a Judge of a Court in some other part of the Commonwealth or in any other country outside the Commonwealth, the period for

---

88 Ibid., s. 91 (5).

89 Ibid., s. 91 (3).

90 Ibid., s. 94 (2).

which the Justice of Appeal is appointed shall be not less than three years.[91]

A Justice of Appeal can be removed from office only for the two reasons and in accordance with the procedure applicable to a Judge of the Supreme Court.[92] The proceedings for removal of a Justice of Appeal, however, are initiated by the President of the Court of Appeal.

(3) Jurisdiction of The Courts

The Supreme Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law (including of course the Constitution). Parliament has the power to create courts inferior to the Supreme Court; and such courts do exist, e.g. the Magistrates' Courts.[93] The Supreme Court exercises control over subordinate courts through appellate, revisionary and general supervisory jurisdiction.[94]

The Court of Appeal has exclusive jurisdiction to determine appeals from the Supreme Court. In some cases the appeal lies as of right and in other cases with leave.[95]

From decisions of the Court of Appeal, an appeal lies to

---

91 Ibid., s. 95 (2).

92 Ibid., s. 95 (3), (4), (5) and (6).

93 Created by the Magistrates' Courts Ordinance, Chap. 10 of the Laws of Fiji.

94 Supreme Court Ordinance, Chap. 9 of the Laws of Fiji.

95 Constitution, s. 99.

Her Majesty in Council. Here too in some cases the appeal lies as of right and in other cases with leave.[96]

G. Service Commissions and the Public Service

The Constitution creates a number of agencies with important functions of government. Some of them would fall within a familiar categorization of administrative agencies, others would not. The functions they perform may be adjudicative or executive or some combination of both.

(1) Judicial and Legal Services Commission

The Constitution provides for a Judicial and Legal Services Commission consisting of the Chief Justice as the Chairman, the Chairman of the Public Service Commission and one other member appointed by the Governor-General, acting in accordance with the advice of the Chief Justice.[97] The appointed member must be qualified to be appointed a Judge but he must not be in active practice as a barrister and solicitor in Fiji.[98]

The Commission appoints and has the power to remove and to exercise disciplinary control over persons holding office as or

---

96 Ibid., s. 100.

97 Ibid., s. 101.

98 However the present appointed member, Mr S. B. Patel, is an active practitioner but there was specific exemption in his case: s. 13 of the Fiji Independence Order 1970. There are other disqualifications of an appointed member: Constitution, s. 101 (4).

acting as legal officers.[99] Before making any appointment to hold or act in the office of a Central Agricultural Tribunal, the Commission must consult the Prime Minister and the Leader of the Opposition. Further, the Commission cannot appoint to an office under its jurisdiction a person who is not a citizen of Fiji and is not a public officer, unless the Prime Minister consents to the appointment.[1]

(2) Public Service Commission

The Constitution[2] provides for a Public Service Commission consisting of a Chairman and not less than three nor more than five other members appointed by the Governor-General in accordance with the advice of the Prime Minister tendered after the latter has consulted the Leader of the Opposition.[3] A person is not qualified for appointment if he is, or has at any time during the three years immediately preceding his appointment been:[4]

(a) a member of either House of Parliament or an elected member of any local authority;

(b) nominated with his consent as a candidate for election as a member of the House of Representatives or of any local authority or as a candidate for selection by the Great Council of Chiefs or the Council of Rotuma for appointment by the Governor-General as a member of the Senate;

---

99 Ibid., s. 102. That is the officers specified in schedule 3 of the Constitution, see n. 76 p.131, ante.

1 Ibid., 102 (2).

2 Ibid., s. 104.

3 Ibid., s. 104 (8).

4 Ibid., s. 104 (2).

(c) a public officer or a local government officer; or

(d) the holder of an office in any political organization that sponsors or otherwise supports or has during the said period of three years sponsored or otherwise supported a candidate for election to the House of Representatives.

Further, a person is also disqualified for membership if he is a member (except the Chairman) of the Police Service Commission.

This Commission is responsible for making appointments of public officers and for removing and exercising disciplinary control over persons holding or acting in such offices. However, the Commission has no jurisdiction over the offices falling under the jurisdiction of other Commissions and other specified offices.[5] Also the Commission cannot make any appointment to the office of Secretary to the Cabinet or of a Permanent Secretary or of any other supervising offices within section 82 of the Constitution unless the Prime Minister concurs in the appointment.[6] There are other similar restrictions on appointment to the staffs of other officers, e.g. of the Governor-General and the Ombudsman.

(3) Police Service Commission.

The Constitution[7] provides for a Police Service Commission which consists of a Chairman and two other members appointed

---

5 E.g., a Judge, Ombudsman etc.; Ibid., s. 105 (3).

6 Ibid., s. 105 (5).

7 Ibid., s. 106.

by the Governor-General. The disqualifications from membership are similar to those relating to the Public Service Commission.[8] The functions of this Commission are to appoint, to remove and to exercise disciplinary control over members of the Police Force above the rank of Senior Inspector. However, for appointments of the Commissioner and Deputy Commissioner of Police, the Commission must consult the Prime Minister. Jurisdiction over police officers below the rank of the Senior Inspector is vested in the Commissioner of Police, but the Commission must concur in the removal or demotion of an officer.[9]

(4) The Electoral Commission and the Constituency Boundaries Commission

The Constitution[10] provides for an Electoral Commission consisting of a Chairman appointed by the Governor-General, acting in accordance with the advice of the Judicial and Legal Services Commission, and not less than two nor more than four members appointed by the Governor-General, acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition. The disqualifications from membership of this Commission are similar to those relating to the Public Service Commission.[11]

The Electoral Commission has the general responsibility for, and supervises the registration of voters for the election of members of the House of Representatives and the conduct of elections

---

8 Ibid., s. 106 (2).

9 Ibid., s. 107.

10 Ibid., s. 42.

11 Ibid., s. 42 (2).

of such members.

There is also provision for a Constituency Boundaries Commission consisting of a Chairman and two other members appointed by the Governor-General, acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.[12] The disqualifications from membership of this Commission are similar to those relating to the Electoral Commission. The general function of this Commission, as its title suggests, is to prescribe the boundaries of constituencies for the purpose of the election of members of the House of Representatives. It is also entrusted with the duty of reviewing the boundaries of the constituencies not later than every ten years.

(5) The Commission on the Prerogative of Mercy

The Constitution vests the prerogative of mercy in Her Majesty exercisable in Fiji by the Governor-General. However, the Governor-General exercises such powers in accordance with the advice of the Commission on the Prerogative of Mercy created by the Constitution.[13] This Commission consists of a Chairman and not less than two other members appointed by the Governor-General.

H. The Director of Public Prosecutions

The Constitution[14] provides for the public office of Director

---

12 Ibid., s. 38.

13 Ibid., s. 88.

14 Ibid., s. 85.

of Public Prosecutions. The Director is appointed by the Judicial and Legal Services Commission; but the Commission cannot appoint a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister so agrees.[15]

The Director of Public Prosecutions has the general responsibility for all criminal proceedings in Fiji. In the exercise of his powers he is not subject to the direction or control of any other person or authority.[16]

The Director of Public Prosecutions holds office until he attains the age of sixty years unless he resigns earlier. He may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour.[17] In any event he can only be removed by the special procedure prescribed by the Constitution. This entails the appointment by the Judicial and Legal Services Commission of a tribunal which shall enquire into the matter, report on the facts to the Commission and advise the Commission whether he ought to be removed. Only if the tribunal so advises can the Commission remove the Director of Public Prosecutions.[18]

I. The Auditor General

The Constitution[19] provides for an Auditor-General appointed by the Public Service Commission. He has the general function

---

15 Ibid., s. 102 (1) (b).

16 Ibid., s. 85.

17 Ibid., s. 109 (2).

18 Ibid., s. 109 (4).

19 Ibid., s. 126.

of auditing and reporting on the public accounts of Fiji and those of all courts of law and all authorities and officers of the government. The Auditor-General submits his reports to the Minister responsible for finance who causes them to be laid before each House of Parliament. In the exercise of his functions the Auditor-General is not subject to the direction or control of any other person or authority.[20]

The Auditor-General has the same tenure as the Director of Public Prosecutions and he may not be removed from office except for the same grounds and in the same manner as the Director.[21]

J. Citizenship

(1) Acquisition of Citizenship

The law is relatively simple. Fiji citizenship may be acquired as of right in two ways - by operation of law and by registration.

(a) By operation of law

There are five ways of acquiring citizenship by operation of law. First, every Fiji-born person who was on 9 October 1970 a citizen of the United Kingdom and Colonies automatically became a citizen of Fiji on 10 October 1970.[22]

---

20 Ibid., s. 126 (4).

21 Ibid., s. 109 (4). Except it is the Public Service Commission who removes him and appoints the tribunal and not the Judicial and Legal Services Commission).

22 Ibid., s. 19 (1).

Secondly, every person who on 9 October 1970 was a citizen of the United Kingdom and Colonies and who:[23]

(a) became such a citizen under the British Nationality Act 1948 by virtue of his having been naturalized by the Governor of the former Colony of Fiji as a British subject before that Act came into force;

(b) became such a citizen by virtue of his having been naturalized by the Governor of the former Colony of Fiji under that Act; or

(c) became such a citizen by virtue of his having been registered by the Governor of the former Colony of Fiji under that Act before 6 May 1970,

became a citizen of Fiji by law on 10 October 1970.

Thirdly, every person who, having been born outside Fiji, was on 9 October a citizen of the United Kingdom and Colonies became a citizen of Fiji on 10 October 1970 if his father became or would but for his death have become a citizen of Fiji by virtue of the abovementioned provisions.[24]

Fourthly, every person born in Fiji after 9 October 1970, becomes a citizen of Fiji at the date of his birth except for

(a) those whose father possessed such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to Fiji and neither of his parents is a citizen of Fiji; or

(b) those whose father is an enemy alien and the birth occurs in a place then under occupation by the enemy.[25]

---

23 Ibid., s. 19 (2).

24 Ibid., s. 19 (3).

25 Ibid., s. 21.

Fifthly, a person born outside Fiji after 9 October 1970, becomes a citizen of Fiji at the date of his birth if at that date his father was a citizen of Fiji otherwise than by virtue of the provisions of section 19 (3) of the Constitution.[26]

(b) By Registration

There are three circumstances in which persons are entitled to be registered as citizens of Fiji. First, any woman who, on 10 October 1970 was or had been married to a person -

(i) who became a citizen by operation of law a mentioned above; or

(ii) who, having died before 10 October 1970 would, but for his death, have become a citizen of Fiji by operation of law as mentioned above,

is entitled, upon making application and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Fiji.[27] It is significant to note that this privilege under the current provision extends only to a woman and not to a man.

Secondly,[28] any person, being a Commonwealth citizen (otherwise than by virtue of being a citizen of Fiji), who immediately before 10 October 1970 was a person deemed to "belong" to Fiji within the meaning of section 16 (3) of the 1966 Constitution,[29]

---

26 Ibid., s. 22. As to s. 19 (3) see n. 24 p.144 ante.

27 Ibid., s. 20 (1).

28 Ibid., s. 20 (2).

29 S. 16 (3) provides:

> For the purposes of this Chapter, a person shall be deemed to belong to Fiji if that person is a British subject or a British protected person and -

cont...

could have registered himself as a Fiji citizen

(i) providing he made such application before October 1972 and

(ii) providing he, being a citizen of any other Commonwealth country renounced his citizenship of that other country or if that was not allowed by that other country, he made the

---

29 cont.

(a) was born in Fiji;

(b) has resided in Fiji for a period extending over not less than seven years, during which he has not been absent from Fiji for a period or periods amounting in all to more than eighteen months:

Provided that no period in respect of which a student's permit issued under section 10 of the Immigration Ordinance, 1962, or any enactment repealing or in substitution for the same, is in force, shall be counted as residence for the purposes of this paragraph;

(c) has obtained the status of a British subject by reason of the grant in Fiji of a certificate of naturalisation under the British Nationality and Status of Aliens Act 1914 or the British Nationality Act 1948;

(d) is the child, step-child or child adopted in a manner recognized by law under the age of eighteen years of a person to whom any of the foregoing paragraphs apply; or

(e) who, on the 1st September, 1962, was resident in Fiji and who -

(i) immediately prior to the said date was entitled under the provisions of sub-paragraph (ii) of paragraph (a) of section 3 of the Immigration Ordinance (now repealed) to exemptions from the provisions of that Ordinance; or

(ii) has been granted by the Principal Immigration Officer or by a court exemption from the provisions of the Immigration Ordinance (now repealed) on account of being domiciled in Fiji.

prescribed declaration.

Thirdly, any woman who after 9 October 1970 married a person who was or became a citizen of Fiji shall be entitled to be registered as a citizen of Fiji if she, being a British protected person or an alien, takes the oath of allegiance.[30] It is again significant to note that this privilege extends only to a woman and not to a man.

(2) Termination of Citizenship

The Constitution empowers Parliament to make provisions for the termination of citizenship but such powers are very restricted. Parliament cannot deprive those persons who became citizens by operation of law or who were registered as citizens by virtue of "belonging"[31] of their citizenship[32] except in the case of a person who, having attained the age of twenty-one years and who being a citizen of some other country, has not within the prescribed period renounced his citizenship of that other country or if that other country does not permit such renunciation, has failed to make the prescribed declaration.[33] In all other cases, Parliament may pass legislation depriving them of their citizenship.[34]

It is difficult to find a justification for the distinction between the two types of citizenship as far as the deprivation of citizenship

---

30 Constitution, s. 23.

31 See n. 29 ante as to those who "belong".

32 Constitution, s. 25 (b).

33 Ibid., s. 25 (b) and (e).

34 Ibid., s. 25 (b).

is concerned. In any event, even if there was a reason for distinguishing between a citizen who had become a citizen by virtue of operation of law and those who had become citizens by registration, it is hard to understand why there should be distinctions among the various groups within the latter class. It is submitted that once a person becomes a citizen he should be under no greater a disability than any other citizen.

It is interesting to note that there was agreement at the 1970 Constitutional Conference that dual citizenship should be prohibited. It was for this reason that section 25 (e) was included.[35] In 1971 the Fiji Parliament enacted the Fiji Citizenship Act.[36] In the debates in the House of Representatives both the Opposition and the Government supported the move for disallowing dual citizenship.[37]

For instance, Mr S.M. Koya, the Leader of the Opposition stated:[38]

---

35 S. 25 (e) provides:

> Parliament may make provision - ...
> for depriving of his citizenship of Fiji any citizen of Fiji who has attained the age of 21 years and who, being a citizen of some other country, has not, within such period as may be prescribed, renounced his citizenship of that other country or, if the law of that other country does not permit him to renounce his citizenship of that other country, made such declaration as may be prescribed.

36 No. 27 of 1971.

37 Fiji Parliamentary Debates (1971) (Part 1), 654 - 707.

38 Ibid., 657 - 658, (emphasis added).

> [A]fter our return from London we have been criticised in some quarters rather seriously on our agreement that there should be a complete prohibition on people holding double passports or people holding dual citizenship. Throughout the Constitution, in relation to this matter, Mr Speaker, you would see that this proposal has been given effect to and indeed, the present bill also gives effect to that intention.

Similarly other members, speaking on the Bill assumed that the proposed measure would prohibit dual citizenship. Mrs L. Livingston, a government member, in supporting the Bill, condemned dual citizenship and said, "dual citizenship will never build a nation."[39]

Surprisingly, in spite of the expressed condemnation of dual citizenship, the enactment had very limited effect on dual citizenship. Section 16 provides:

> Any person, being a citizen of Fiji and also a national or citizen of some other country, who has attained the age of twenty one years on or after the commencement of this Act, shall within twelve months of such commencement or his attaining that age, whichever shall be the later date, renounce the nationality or citizenship of that other country failing which he shall cease to be a citizen of Fiji.
>
> Provided that the Minister may, when he is satisfied that any such person was absent from Fiji during the said period of twelve months or for other good cause, extend the time within which such person shall renounce the nationality or citizenship of that other country.

It is submitted that this provision seems to affect only those persons who held dual citizenship during the transitional period after independence. Those affected can be divided into two classes - those persons who were minors at the time of the coming into force of the enactment and those persons who were adults at the

39 Ibid., 676. See also Mr U. Koroi: Ibid., 675.

time. Thus, any citizen of Fiji who was over twenty one years of age on 28 May 1971 (when the Fiji Citizenship Act 1971 came into force), if he had been a national or citizen of some other country at that time, had to renounce the citizenship or nationality of that other country within twelve months of the commencement of the 1971 Act - that is by 28 May 1972 - if he wanted to retain his Fiji citizenship. If he failed to do so, he would have automatically ceased to be a Fiji citizen.

Secondly, any citizen of Fiji who was under twenty one years of age on 28 May 1971, if he had been a national or citizen of some other country at that time, had to renounce the citizenship or nationality of that other country if he wanted to retain his Fiji citizenship. However, in his case he had to do so by 28 May 1972 if he attained twenty one years before that date, otherwise he had to do so when he attained twenty one years of age.

It is submitted, that section 16 does not seem to cover those persons who acquired citizenship or nationality of another country after the expiry of the period specified in the section.[40] Moreover, it may not cover those persons who had renounced their citizenship or nationality within the specified period, but who subsequently re-acquired the same citizenship or nationality

---

40 E.g., B., who was born in Fiji, was over 21 years of age in 1971 and was not a citizen or national of any other country (but Fiji) in 1971, had no nationality or citizenship to renounce within 12 months as specified in s. 16 of the 1971 Act. However, if in 1974 he acquired Australian citizenship, it is submitted, he is not forbidden by s. 16 to hold dual citizenship.

outside the specified period.

Accordingly, it is submitted, the 1971 Act has only a very limited application in its prohibition of dual citizenship or nationality. If the intention was only to "catch" those persons who were dual citizens or nationals in 1971, of course the enactment meets its purpose. However, if the intention was to prohibit absolutely dual citizenship, the enactment does not achieve its purpose. It seems, it is submitted, that the latter must have been intended. Otherwise there is no legitimate or cogent reason for the enactment operating against some persons and not against others.

K. Fundamental Rights

The Fiji Constitution provides for the protection of fundamental rights and freedoms of the individual.[41] Five basic concepts are provided for in the Constitution.

(i) Liberty of the person.

This concept has of course many facets. Liberty of the person embraces freedom from arbitrary arrest, prohibition of slavery and forced labour, freedom from retrospective criminal laws, freedom from repeated trials for the same offence, freedom of citizens from banishment and restrictions on movement, protection for the privacy of his home and other property, protection of the law, protection from inhuman treatment and the right of fair trial.

---

41 This subject of "fundamental rights" is dealt with in greater detail at pp. 427 et seq., post.

(ii) Freedom of religion.

(iii) Freedom of speech, assembly and association.

(iv) Freedom from discrimination.

(v) Protection of property from acquisition without adequate compensation.

However, all these basic concepts are not granted (or protected) in absolute terms. Most of them may be largely or entirely abrogated by ordinary legislation if the reason for such legislation falls into one of the specified classes; in other words there are specified exceptions for derogation from the fundamental rights.[42] The only "rights" which are granted in absolute terms are:

(i) prohibition against slavery and forced labour;[43]

(ii) protection from torture and inhuman or degrading punishment or other treatment;[44]

(iii) freedom from retrospective criminal laws;[45] and

(iv) freedom from repeated trials for the same offence.[46]

Otherwise, the rights and freedoms are granted subject to exceptions and qualifications allowing for derogations in specified circumstances.[47]

---

42 This matter is dealt with more adequately at pp.427 et seq., post.

43 Constitution, s. 6.

44 Ibid., s. 7.

45 Ibid., s. 10 (4).

46 Ibid., s. 10 (5).

47 See n. 42, ante.

PART FOUR

THE PARLIAMENT AND THE COURTS IN FIJI

CHAPTER V

THE EXISTENCE OF JUDICIAL REVIEW

A. Introduction

The majority of the countries which gained independence from Britain in the Commonwealth era,[1] as opposed to the Empire era, rejected the doctrine, fundamental to United Kingdom constitutional law, of the legal omnipotence of statutes enacted by a simple majority of each House. Whilst patterning its government institutions on the "Westminster Model", Fiji has followed this modern trend and, like its contemporaries in independence, has adopted a different principle.

Fiji's departure from her United Kingdom prototype is illustrated by the rejection of traditional English constitutional ideas and by the incorporation in the Constitution of formal limitations, such as the Bill of Rights[2], on governmental authority, both executive and Legislative. Unlike the United Kingdom, Fiji has a written constitution which is the sole source of constitutional authority. To a considerable extent what is only unwritten law (including custom and convention) in the United Kingdom has been converted into formal rules embodied in the Fiji Constitution itself. For instance, the Constitution prescribes[3] the structure of government and the relationship inter se of the various agencies of government. It in effect provides an elaborate blueprint for a people not yet experienced in the practice of representative democratic government.[4]

The Constitution of Fiji, as has been said, is the sole source

---

1 E.g., India, Pakistan, Ireland, Nigeria, Kenya and Mauritius.

2 Constitution, ss. 3 - 18.

3 Ibid., ss. 70, 72, 79, 82, and 86.

4 Only in 1966 did Fiji secure a truly representative legislature; see p.95 , ante.

of constitutional authority in Fiji. It is the fundamental and supreme law of the land. Section 2 of the Constitution expressly provides:

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

This provision has several important effects. No act of the government whether executive, legislative, or judicial, which is contrary to the Constitution can be valid. It is under this fundamental law that all other laws are made and executed and under which all authorities - legislative, executive and judicial - shall act. It is with reference to this fundamental law that the validity of the functioning of the different organs of government is judged. Thus in Fiji the Constitution conditions the whole governmental process in the country.

However, in terms of the functional organization of government, the Fiji Constitution continues the fundamentals of English constitutional organization, namely, the institution of representative government as expressed through a parliamentary executive (the Cabinet) formally responsible to and controlled by the legislature. The basic and fundamental qualification that needs be made relates to the institution of judicial review.

B. Meaning of "Judicial Review"

The meaning of the term "review" has been given as:[5] "the act of looking over something (again) with a view to correction or improvement". Thus the primary legal meaning of the term "judicial review" would be, it is submitted, the revision of the

---

5 The Shorter Oxford English Dictionary (3rd ed., revised, 1964).

decision, decree, order, act or omission of a court, person or agency by a court or higher court of competent jurisdiction. This form of judicial review is part of the judicial administration, in some form or another, of every country, irrespective of the nature of its constitutional arrangements. After all, the judiciary of every country plays the very important, in fact vital, role of interpreting and applying the law and adjudicating upon issues and controversies between citizen and citizen or between a citizen and the state or one of its agencies.

However, "judicial review" has a more technical signifcance in the public law of a country with a written constitution, such as the United States of America or Fiji, which has adopted the principle of the supremacy of the constitution. This appears from the theory of two classes of law - ordinary and organic. Thus as soon as it is established that there is a paramount law which constitutes the foundation and source of all other legislative authority in the body politic, it follows that any act of the ordinary law-making body which infringes the provisions of the paramount law must be void. It also follows that there must be some agency or organ in existence which has the power or authority to pronounce upon the validity of such legislative acts. In the United States of America, this task was assumed by the judiciary. This is the primary sense of a judicial review of legislative acts.

However, in public law, judicial review is not confined to a review of legislative acts. Once the constitution of a country is regarded as the supreme or paramount law of the land and it is accepted that the powers of all other organs of the government emanate from it, it naturally follows that not only the powers of the law-making agency, that is the legislature but also those of the executive and all other administrative agencies are limited by

the constitution and their acts must be kept within the limits of its provisions. Thus any act which contravenes the provisions of the constitution must likewise be void and the courts must so pronounce. But judicial review of executive and administrative acts is not peculiar to countries with a written constitution. In countries like the United Kingdom, where there cannot be any judicial review of legislation in the strict sense, owing to the omnipotence of the legislature, there is judicial review of administrative and other acts in a way not substantially different from a country like the United States with a written constitution. There can be a judicial review of administrative acts not only on the ground of breach of the supreme law, the constitution, but also on the basis that they are not authorised by the ordinary law. The ordinary or statutory law is normally the source of authority for administrative actions and the doctrine of ultra vires has a broad application in this sphere of ordinary law.[6]

Judicial review may thus be briefly stated as representing the power of the courts to hold invalid and hence unenforceable any law, any official action based upon it, and any illegal action by a public officer which is deemed to be in conflict with a basic law, such as the Constitution of Fiji and the United States of America.[7] In other words, by invoking the power of judicial review, a court applies the "superior" of two laws.[8] It is the judicial review of legislative acts that concerns us for present purposes.

---

6 See generally S.A. de Smith, Judicial Review of Administrative Action (3rd ed., 1973).

7 Henry J. Abraham, The Judiciary (2nd ed., 1968), 97.

8 Ibid., 98.

C. The Traditional English View

The traditional English view is that judicial review of the validity of statutes is impossible.[9] In the United Kingdom, Parliament is supreme in the sense that any law which has been enacted by it and which has received the Royal Assent is valid and binding and is the law of the land. No court can declare a statute invalid as being contrary to any other superior law. Thus in 1871 Willes, J. stated:[10]

> We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament ... exists as law, the Courts are bound to obey it.

Support for this traditional view can be found both in other cases and writings.[11] The view taken by the courts in the United

---

9 However, the question whether a purported legislation is the authentic expression of the will of the legislature - that is whether a measure is an "Act of Parliament" - is a separate issue and is dealt with elsewhere; see pp.233, et seq., post.

10 Lee v Bude and Torrington Junction Railway Co. (1871) L.R. 6 C.P. 577, 582. See also Edinburgh and Dalkeith Railway v Wauchope (1842) 1 Bell's App. Cas. 252, 279, per Lord Campbell, and Middleton v Anderson (1842) 4 D. 957 1010 per Lord Mackenzie.

11 See Mortensen v Peters (1906) 14 S.L.T. 227, 334, per Lord Dunedin; Hoani Te Heuheu Tukina v Aotea District Maori Land Board [1941] A.C. 308, 322, per Lord Simon: Labrador Co. v The Queen [1893] A.C. 104, 103; and A.V. Dicey, The Law of the Constitution (10th ed., 1960), 39, where the learned author states:

> Parliament ... has under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.

Further at page 40, the learned author continues:

> Any Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the courts.

Kingdom is related to the historical development and evolution of the concept of the modern parliament as a legislature and as a court. Basically, it is submitted, there are two main factors which have influenced the traditional view that courts cannot question Acts of the United Kingdom Parliament.[12]

Firstly, Parliament in the United Kingdom is omnicompetent. In this regard its area of legislative competence is unlimited. Hence no court can question the content, extent or policy of Acts of Parliament.[13] The English Parliament gradually asserted and secured unlimited legislative powers and was not responsible to any other superior or controlling power. Secondly, there is the old concept of the High Court of Parliament, according to which Parliament partook of the character of a court.[14]

A brief reference to the historical development of parliament-

---

12 Cf. B. Beinart, 'The Parliament and the Courts,' (1954) S.A. L.R. 135 138, where the learned writer contends that there are three main factors which have contributed to English Courts not questioning Acts of Parliament:

> Firstly, owing to Parliament's omnicompetence, the area of legislative power is so wide that the contents, extent and policy of an Act can never be questioned. That indeed is the main purport of the dictum in Lee's case. Secondly, each House of Parliament enjoys an unduly wide (but not unlimited) freedom regarding the manner of legislation. Thirdly, there is the old concept of the High Court of Parliament, according to which Parliament as a whole partook of the character of a Court.

It is submitted with respect that the second factor mentioned by the learned writer is really a result of the traditional view and not a contributing factor to it. In any event it may be said to be included in the first factor so mentioned.

13 Ibid., 138.

14 Idem.

ary power in England would assist in appreciating the traditional stand taken by the English Courts.[15] In fact, it is submitted, the traditional English view cannot be divorced from its historical background.

The English Parliament did not take its modern form by virtue of being merely a legislative body as such. In the middle ages, and much later, the English Parliament was not primarily a legislature or law making body, as it is today, but principally a court. In the course of time and by gradual development, Parliament came to acquire its modern characteristics.

The English Parliament of the thirteenth and fourteenth centuries were, like the Spanish Cortes or the French Estates General, assemblies in which the King met the various Estate of his Realm.[16]

> In the thirteenth century the King's Council was the 'core and essence' of Parliament; and the term 'Parliament' [meant] rather a colloquy than a defined body of persons. 17

The King's Council at the Parliament dealt with state matters, including matters of taxation and legislation.[18] However, there were two other matters of significance for present discussion.

---

15 This is treated in greater detail by W.S. Holdsworth, A History of English Law (7th ed., 1956), vol. I and vol II (3rd ed., 1923); Holdsworth, "Central Courts of Law and Representative Assemblies in the Sixteenth Century" (1912) 12 Col. L. Rev. 1; Anson, Law and Custom of the Constitution (5th ed., 1922), vol. I 25 - 45 and 254 - 266; H.S.C. Feilden, A Short Constitutional History of England (3rd ed., 1908), Chs II, III and IV.

16 Holdsworth, loc., cit., 12.

17 Ibid., 13; Holdsworth, op. cit., vol. I, 352.

18 Ibid., 354.

First, it heard important cases.[19] It did not merely sit as a court of appeal but exercised original jurisdiction. Secondly, it answered petitions.[20] The petitions were of different kinds.[21]

In the course of the fourteenth century this "colloquy" developed into a body possessed of particular powers and privileges which helped to consolidate its position in the State.[22] From the King's Council in Parliament there emerged the House of Lords, and from the knights and burgesses who were summoned to meet the King's Council in Parliament, there developed the House of Commons. Thus the modern Parliament took shape.[23]

As the fourteenth century advanced, the initiation of legislation gradually passed from the Crown to the Commons and sometimes to the Lords. The effectual means by which this position was confirmed was by a change in the mode of enacting statutes which became general in Henry VI's reign. Legislation by way of petition was replaced by legislation by way of Bill. This change in the form of the enactment emphasised the position which both Lords and Commons had secured as partners in the field of legislation.[24]

It is of significance that from an early period lawyers have been distinguished members of the House of Commons. Judges

---

19 Idem.

20 Ibid., 355.

21 E.g., some of them claimed for relief which could be secured by ordinary action; some asked favours of the King; some asked for new legislation: ibid., 355.

22 Holdsworth, loc. cit., 13 et seq.

23 Idem.

24 Holdsworth, op. cit., vol. II, 438 et seq.

and law officers were from the earliest period members of the Council, which was at first the "core and essence"[25] of the Parliament. Even when the judges and law officers ceased to be members of the House of Lords, they continued to be summoned to the House of Lords by Writs of Attendance.[26] Holdsworth remarks:[27]

> This is a fact of the greatest importance in the history of the English Parliament because it meant that the best legal talent of the day was ready to assist in the development of its powers .... the men who spent their lives in working and developing them were the men who were best fitted to create a workable set of rules for the guidance of a representative assembly.

The English Parliament from the beginning was regarded as the highest court known to the law[28] - a court

> in which relief could be given which could not be given elsewhere;in which powers could be exercised which neither the King nor any other body in the state could exercise,in which the errors of their own courts could be redressed.[29]

The lawyers never took a narrow or technical view of its powers and privileges. The judges in the fifteenth century declined to give an opinion as to their extent.[30] Thus, as its powers expanded, it

---

25 Holdsworth, loc. cit., 13.

26 Ibid., 15.

27 Idem.

28 Holdsworth, op. cit., vol. II, 434. Thus the learned author states at 433:

> It was said in 1593 (D' Ewes, Journal 514) that, 'This court for its dignity and highness hath privilege, as all other courts have; and as it is above all other courts, so it hath privilege above all other courts; and as it hath privilege and jurisdiction too so hath it also coercion and compulsion'."

29 Holdsworth, loc. cit., 14.

30 Holdsworth, op. cit., vol. II., 434, 445 and 561.

was able to develop independently and without outside influence or control.

Such development of the powers of Parliament had two major effects. First, there developed the division of the power of the Parliament into judicial and legislative branches. In this regard the existence of Parliament as a petitioning, taxing and legislative body helped to introduce and develop these distinct characteristics of a legislative and a judicial body.[31]

The second major effect was the origin of the peculiarly English combination of the doctrine of the rule of law and the doctrine of the legislative supremacy of Parliament. In England, the theory that the law was supreme was a major premise which was used to justify logically the control over taxation and legislation which Parliament had acquired.[32] Elsewhere in Europe, at this time, the current doctrine recognised the supremacy of a fundamental law which no power in the State could change. However, in England towards the end of the Middle Ages it was coming to mean the supremacy of the law which could be modified and changed by Parliament. By the end of the fifteenth century the legislative supremacy of Parliament was fully recognised.[33]

As mentioned earlier, it was of great significance that lawyers were distinguished members of the House of Commons. The increase in the powers of Justices of the Peace also aided the development of the two distinct powers of Parliament. As many of the members of Parliament were Justices of the Peace, they had helped to make some of the laws which they administered.[34] Hence they were in a better position to understand them and apply them intelligently.[35]

31 Ibid., 441 - 442.

32 Idem.

33 Holdsworth loc. cit., 21.

34 Idem.

35 Ibid., 22.

Furthermore, till towards the end of Elizabeth's reign, judges served on some committees of the House of Lords, not as advisers but as members.

As to its judicial functions, Parliament in the sixteenth century was regarded as "the highest and most authentic court of England." Its judicial functions and attributes were well marked.[36]

Parliament's non-judicial functions were also being rapidly developed. Hence by the end of the sixteenth century Parliament had developed functions which were equally consistent with it being a council or a court. Professor Holdsworth points this out.[37]

> It had indeed become very different from any other court, for in it were represented the king and the three estates of the realm - 'The great corporation or body politic of the kinddom'. It was this fact which gave to it its 'high, absolute, and authentical power;' and it was these powers which were destined to so expand in the following century that the sovereignty of Parliament has become the central and characteristic feature of English constitutional law.[38]

Thus the English Parliament developed its parallel powers - as a judicial body and as a legislative body - simultaneously. Ultimately it became a truly legislative assembly without losing all of its characteristics as a judicial body. In fact, a petition to Parliament for a private act still retains the judicial features which earlier characterised all legislation. The passage of the ordinary private

---

36 Ibid., 24.

37 For the various kinds of jurisdiction exercised by the House of Lords see Holdsworth, op. cit., vol. I, 365 - 394.

38 Holdsworth, loc. cit., 26.

Bill resembled a civil action and the enactment of an Act of Attainder a criminal trial.[39] Eventually, it came to be realized that Acts of Parliament, whether public or private, were legislative in character and the courts of law were obliged to accept that these Acts, however morally unjust, had to be obeyed.[40] When an Act of Parliament acquired such authority and status, the supremacy of the law came to mean supremacy of Parliament. That is, Parliament could pass any legislation on any subject whatsoever, and its content, extent and policy could not be questioned by courts of law. This historical background coupled with the judicial view of Parliament's supremacy as law-maker as well

---

39 Ibid., 27. The learned author says:

> Thus it was the practice to hear counsel at the Bar of the House on such bills, see D'Ewes, Journal 50, 68, 86, 317; at p. 124 (1566) there is the following entry: 'This morning the Dean of Westminster was present at the Bar with his counsel; viz., Mr Edmund Plowden of the Middle Temple, and Mr Ford a civilian. The Dean himself made an oration in defence of the Sanctuary, and alleged divers grants by King Lucius and other Christian Kings, and Mr Plowden alleged the grant of Sanctuary there by King Edward five hundred years ago: viz., Dat. in an 1066 with great reason in law and chronicle; and Mr Ford alleged divers stories and laws for the same; and thereupon the bill was committed to the Master of the Rolls, and others(not named) to peruse the grants, and to certify the force of the law now for Sanctuaries.

40 Idem. The learned author cites "Co. Fourth Instit, 37, 38,

> I had it of Sir Thomas Gawdye Knight, a grave and reverend judge of the King's Bench, who lived at that time, that King H. 8 commanded him to attend the chief justices and to know whether a man that was forthcoming might be attainted of High Treason by Parliament, and never called to his answer. The Judges answered that it was a dangerous question, and that the High Court of Parliament ought to give examples to inferior Courts for proceeding according to Justice. But being by the express commandment of the King, and pressed by the said Earl [Cromwell] to give a direct answer: they said that if he be attainted by Parliament it could not come in question afterwards, whether he was called or not to answer Facta tenent multa, quae fieri prohibentur; the Act of Attainder being passed by Parliament - did bind as they resolved.

as the "Highest Court" of the realm accounts for pronouncements such as those of Lord Mackenzie, Lord Campbell and Willes, J.[41] Commonwealth Courts have also recognized the fact that the notion of omnipotence of the English Parliament is related to the history of the High Court of Parliament. Thus Dixon J. (as he then was) said:[42]

> The incapacity of the British Legislature to limit its own power ... has been accounted for by the history of the High Court of Parliament, and has been explained as a necessary consequence of a true conception of sovereignty .... Because of the supremacy of the Imperial Parliament over the law, the Courts merely apply its legislative enactments and do not examine their validity ....

This traditional English view was recently re-affirmed and emphasized by the House of Lords in British Railways Board v Pickin.[43] In this case the plaintiff alleged, inter alia, that the passage of a private Act of Parliament, had been fraudulently obtained by the Board and the rights secured under the Act by the Board were therefore ineffective to deprive the plaintiff of his land or proprietary rights. The House of Lords held that the courts had no power to disregard an Act of Parliament whether public or private, nor had the courts power to examine proceedings in Parliament in order to determine whether the passage of an Act had been obtained by means of an irregularity or fraud. Lord Reid stated:[44]

> The idea that a court is entitled to disregard a provision of an Act of Parliament on any ground must seem strange

---

41 See n. 10, p. 159, ante.

42 Attorney-General for New South Wales v Trethowan (1931) 44 C.L.R. 394, 425.

43 [1974] A.C. 765.

44 Ibid., 782.

> and startling to anyone with any knowledge of the history and law of our constitution ....

His Lordship continued:[45]

> The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions.

Lord Morris of Borth-Y-Gest endorsed the principle:[46]

> It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether a Bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is amended or repealed by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.

It can accordingly be asserted with reasonable certainty that in the English Courts there can be no question of judicial review of legislation. Thus the English people, in their fight for freedom against autocracy, stopped with the establishment of the supremacy of the law and with Parliament as the sole source of the law.[47] In contrast, other countries like the United States of America and Fiji for that matter, went further and asserted that there was to be a law superior to the legislature itself. This paramount law has been embodied in a written constitution. In most countries with a written constitution, the judiciary performs the vital role of being the guardian of the constitution. It is the task of the courts,

---

45 Ibid., 787.

46 Ibid., 789.

47 Magna Carta, 1214, Petition of Rights 1628, and Bill of Rights, 1689. The current discussion must be seen subject to the obligations of the U.K. under the European Convention on Human Rights and the E.E.C. See comments in n. 2 p. 233, post.

through the instrumentality of judicial review, to ensure that the limitations imposed by the paramount law are not transgressed by the legislature. However, it must not be supposed that the power of the courts to pronounce upon the validity of laws enacted by the legislature depends solely upon the fact that a country has a written constitution. Some written constitutions do not vest this power in the judiciary.[48] Thus the foundations of judicial review vary from constitution to constitution.

---

48 Although there are other methods of review. Contrast the position in France and Switzerland. Though the Constitution of France is written, it seeks to impose no legally enforceable limitations on the omnipotence of Parliament. There is no judicial review of legislation and no court can declare any law of the French Parliament to be unconstitutional. Instead after a law is enacted, the French constitution provides for its scrutiny, before promulgation, by an extra-judicial body called the Constitutional Council, composed of the nominees of the President and the two Houses of Parliament and of the former President of the Republic who shall be ex-officio members. Article 61 provides that every 'organic law' must be submitted to this Council before its promulgation, while in the case of other bills, it is optional for the President of the Republic to make such reference. The declaration of the Council is final and once a bill is declared unconstitutional by this Council, it cannot be promulgated by the President.

The Swiss Constitution on the other hand empowers the Federal Supreme Court to declare an Act of the Cantonal Legislature to be invalid, if repugnant to the provisions of the Federal Constitution, but the court is given no such powers as regards laws passed by the Federal Legislature. In the Swiss Constitution, the power to determine the validity of Federal laws is given to the people themselves. If 30,000 voters or 8 cantons so demand, a Federal law must be submitted to the people who have the final power to determine whether it shall go into effect or not (Article 89). Subject to this, the guardianship of the Constitution is vested in the Federal Executive (Article 102 (2)). Thus the Swiss Supreme Court has no power of judicial review on the ground of unconstitutionality of acts of the Federal Executive or Legislature.

D. Foundations of Judicial Review of Legislation

(1) United States of America

In the United States the power of judicial review is wielded by the Courts. But it is remarkable that the Constitution drafted by the American Founding Fathers did not expressly confer such an important and, as subsequent history has shown, vital power on the judiciary. The records of the Philadelphia Constitutional Convention of 1787 indicated that though the principle of judicial review was a matter of vital concern to the framers,[49] it was not debated in the convention. Hamilton, however, very shortly afterwards, came forward with the plea that judicial review was an indispensable condition of a limited government.[50] His argument basically was that the limitations imposed by the written constitution upon the organs of government (particularly the legislature) could not be maintained unless there was some authority to determine whether those limitations had been transgressed. Despite the absence of express provision in the constitution, the United States judiciary assigned to itself this onerous task. Accordingly, Chief Justice John Marshall formally propounded the doctrine of judicial review in the United States in the seminal Marbury v Madison.[51] The learned Chief Justice declared:[52]

> The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written .... The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the

---

49 Henry J. Abraham, Freedom and the Court (2nd ed., 1972), 6.

50 Essay No. 78. The relevant text is reproduced in Gunther and Dowling, Cases and Materials on Individual Rights in Constitutional Law (8th ed., 1970), 18.

51 1 Cranch 137; 2 L Ed 60, (1803).

52 Ibid., 176; 73.

legislature shall please to alter it.

> If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.
>
> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
>
> This theory is essentially attached to a written constitution, and, is consequently, to be considered by this court, as one of the fundamental principles of our society....
>
> It is emphatically the province and duty of the judicial department to say what the law is .... If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, ... the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution and not such ordinary act, must govern the case to which they both apply ....
>
> The judicial power of the United States is extended to all cases arising under the constitution.

This was a clear enunciation of two principles which were of vital importance to the young nation. First, the courts have the power, even the duty, of judicial review of legislative acts. Secondly, the constitution of the United States is the supreme and paramount law of the land. If there is a conflict between the fundamental law and the ordinary law, the court is bound to give effect to the paramount law. It is submitted that this power of judicial review of legislation has been deduced by the Supreme Court from its power to determine "all cases arising under the constitution"[53] read

53 Art. III, s. 2 (1).

with Article VI section 2 which says "This Constitution ... shall be the supreme law of the land".

It is beyond question that judicial review is crucial to the governmental process in the United States with its federal character and its principle of the separation of powers. This is well borne out by subsequent judicial history.[54] James Madison, the Father of the American Constitution, wrote that the[55]

> judiciary is truly the only defensive armour of the Federal Government, or rather of the Constitution and laws of the United States. Strip it of that armour and the door is wide open for nullification, anarchy, and convulsion.

The principle of judicial review is now strongly entrenched in the United States. While the power to pronounce upon the unconstitutionality of a statute was originally asserted as incidental to the judicial power, since the case of Marbury v Madison[56] it has come to be considered as a duty of every judge in the United States to treat as void any enactment which violates the constitution.[57]

Thus we see that in the United States the doctrine of judicial review is a gloss put upon the constitution by the judges themselves. This doctrine of judicial review has had great beneficial effects on the governmental process in the United States. It has been a necessary and proper check on possible excesses by the legislatures. Mr Justice Cardozo advanced as his key contention that it is the

---

54 Gunther and Dowling, op. cit., 1 et seq.

55 As quoted in Charles Warren, The Supreme Court in United States History (1937), vol. I, 740.

56 Supra.

57 Carter v Carter Coal Co. 298 U.S. 238 (1936). See also Dred Scott v Sanford, 19 Howard 393 (1857); Brown v Board of Education 347 U.S. 483 (1954).

restraining influence of the doctrine's presence, rather than the frequency of its application that renders judicial review so vital to the governmental process in the United States.[58]

Beneficial though it has been, the authenticity and the legitimacy of the power of judicial review has been questioned. It has been contended that from the premises, the power of judicial review was not the only possible conclusion. There is no specific provision in the constitution declaring that any law repugnant to it shall be "void".[59] Secondly, even though it is accepted that a written constitution per se begets the concept of a paramount law, it does not necessarily follow that the power to determine whether that paramount law has been infringed must vest in the judiciary.[60] Finally, as later pronouncements of the American Supreme Court itself have shown, though the constitution is the fundamental law of the land, not all of its provisions are justiciable. Hence the courts are powerless to interfere with the legislature if it violates those provisions of the constitution which are not justiciable.[61]

There are many other questions raised as to the legitimacy of judicial review in the United States.[62] One vital question raised

---

58 B.N. Cardozo, The Nature of the Judicial Process (1921), 93.

59 Cf. the constitutions of India, Japan, Nigeria and Fiji.

60 Cf. n. 48 p.169 ante. The Constitution of the Fourth as well as well as the Fifth French Republic which placed the power in the hands of a non-judicial "Constitutional Council". The Swiss Constitution adopted another solution.

61 D.D. Basu, Commentary on the Constitution of India (5th ed., 1970), vol. 1, 159.

62 See Gunther and Dowling op. cit., 15 et seq. and D.P. Currie, Federal Courts: Cases and Materials (1968), 26 et seq.

is: was the authority of judicial review asserted in Marbury v Madison a usurpation? This question has long sparked controversy.[63]

It is submitted, however, that there is no longer any doubt that judicial review is very strongly concreted into the structure and workings of government in the United States of America notwithstanding the repeated attacks from both the public and private sectors. The position of the Supreme Court in relation to judicial review is so strong that it has led to the establishment of the doctrine of judicial supremacy. Thus Senator George W. Morris of Nebraska said in the United States Senate:[64]

> We have a legislative body, called the House of Representatives of over 400 men. We have another legislative body, called the Senate, of less than 100 men. We have in reality, another legislative body, called the Supreme Court, of 9 men; and they are more powerful than all the others put together.

The pre-eminent position of the Supreme Court under the American Constitution is due to the powers of judicial review which it assigned itself. The Supreme Court, however, does not wield this power lightly. It does so only after a very careful analysis of the alternatives. Whenever the Court can conceivably find its way clear to do so, it will avoid the drastic consequences of invoking its powers of review.[65] The Court always exercises judicial self-

---

63 There is an extensive attack on judicial review in L. B. Boudin, Government by Judiciary (1932); cf. Justice Holmes in Bloodgett v Holden 275 U.S. 142, 147 (1927). For an elaborate defence of legitimacy see R. Berger, Congress v The Supreme Court (1969).

64 Congressional Record, 71 Cong, 2nd Sess. vol. 72, Part 4, 3566 (Feb. 13, 1930) cited in H. J. Abraham, The Judicial Process (1962), 281; see generally Abraham, op. cit., 281 - 289.

65 Cole v Young 351 U.S. 536 (1956); Schneidor v Smith 390 U.S. 17 (1968), Yates et al v United States 354 U.S. 298 (1957).

restraint.[66]

Whatever may be the attitudes of the Judges and the Court towards the techniques to be adopted in reviewing legislation, the fact of the power of judicial review under the American Constitution is unquestionable.

Australia

In Australia, as in the United States, the constitution does not expressly confer the power of judicial review. Nonetheless, it was certain from the beginning that the Australian Courts would have the power of judicial review. There are several provisions in the constitution of Australia which would be unintelligible unless such a power of judicial review was intended. Thus section 5 of the Constitution of the Australian Commonwealth provides for the operation of the constitution and laws and makes reference to the courts, Judges and people of every State as being bound by the Constitution. Section 74 makes provision for appeals on any question as to the limits inter se of the constitutional powers. Section 76 provides for the High Court having jurisdiction in matters concerning the Constitution or its interpretation as well as in issues arising under other laws of the Federal Parliament or State Legislatures. It is submitted that the very nature of the form of the Constitution reveals that the powers of the Federal Parliament and the State legislatures are such that there must be a higher legal norm controlling those powers,[67] and that being so there must be an agency to

---

66 United States v Butler, 297 U.S. 1 (1936); see also the judgement of Frankfurter J. in Trop v Dulles, 356 U.S. 86 (1958).

67 The powers of the Federal Parliament and the State legislatures are enumerated in ss. 51, 52 and 106 and 109 of the Commonwealth of Australia Constitution Act 1900.

adjudicate thereon. Rich J. observed:[68]

> The legislative powers of the Parliament are not plenary, but are restricted to those conferred upon it by the Constitution and are subject to any limitations or conditions imposed by the Constitution. It cannot free itself from such limitations or conditions; only the process provided for by sec. 128 of the Constitution (or, in theory, the Imperial Legislature) can do that; nor can it decide for itself whether a purported exercise of a power is valid; and if an exercise of a power involves any legal consequences prescribed by the Constitution it cannot exempt itself from any of those consequences. The questions whether an Act of the Federal Parliament is valid, and if so whether it involves any and what legal consequences, can be determined only by an exercise of the judicial power, ... But no body but a court can be invested with such jurisdiction.

From the inception of the Constitution the courts in Australia have exercised their rights of judicial review. As Fullagar J. observed:[69]

> But in our system the principle of Marbury v Madison is accepted as axiomatic, modified in varying degree in various cases (but never excluded) ....

Apart from sections 73 and 74 of the Constitution, the position of the judiciary has been further consolidated by the provisions of Commonwealth legislation, namely the Judicial Act 1903 - 1968 and the Privy Council (Limitations of Appeals) Act, 1968. The result of the legislation is that the High Court alone can determine finally questions of interpretation of the Constitution, subject to the possible contingency of appeal to the Privy Council on the certificate of the High Court itself where there is a jurisdictional conflict between the Federal body and a state or among states inter se.[70]

---

68 Australian Apple and Pear Marketing Board v Tonking (1941) 66 C.L.R. 77, 104. See also Australian Communist Party v The Commonwealth (1950 - 1951) 83 C.L.R. 1, 262.

69 Idem.

70 For a detailed treatment of these matters see W.A. Wynes. Legislative, Executive and Judicial Powers in Australia (4th ed., 1970), Ch. X and XI.

Under section 30 of the Judiciary Act, 1903 - 1968, the High Court has, in addition, original jurisdiction in "all matters arising under the Constitution or involving its interpretation"; and section 40 and 40A of that Act provide for the removal of constitutional cases from the State Supreme Courts to the High Court.

However, the Courts in Australia have stated that they are not entrusted with any power to veto the acts of the legislature. Latham C.J. has observed that:[71]

> Common expressions, such as: 'The courts have declared a statute invalid,' sometimes lead to misunderstanding. A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour - but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power it is invalid ab initio.

The courts have also emphasized that constitutional questions are basically legal and not political.[72] Questions involving matters of policy are beyond the reach of judicial review.[73] The Courts will not entertain questions of constitutionality unless it is necessary for the ascertainment of the position of the parties before it,[74] nor will the Courts hear applications for advisory opinions.[75]

---

71 South Australia v The Commonwealth (1942) 65 C.L.R. 373, 408.

72 Idem.; The Communist Party case, (1950-1951) 83 C.L.R. 1, 148 - 149; Australian National Airways Ltd v The Commonwealth. (1945) 71 C.L.R. 29, 70; Wynes, op. cit., 28 - 34.

73 Broken Hill South Ltd v Commissioner of Taxation (1936-1937) 56 C.L.R. 337, 375; Elliott v The Commonwealth (1935-1936) 54 C.L.R. 657, 665.

74 Bruce v Commonwealth Trade Marks (1904) 4 C.L.R. 1569.

75 Re Judiciary and Navigation Acts (1921) 29 C.L.R. 257; cf. the position in Canada where advisory opinions are frequently given.

Professor G. Sawer, with respect, rightly points out that in Australia, the impact of judicial review has been made much less severe than it might have been by the practice of "reading down" and "blue-pencilling". These are ways of severing the invalid from the valid portions of challenged legislation, leaving the latter parts to operate alone.[77] "Reading down" occurs when two meanings are possible, that construction will be accepted which will give validity to the enactment.[78] "Blue pencilling" occurs when some parts of an enactment are valid and others invalid, the invalid part is excised without affecting the rest.

The general rule is that the legislature intends its enactments to be effective in their entirety. There is a common law presumption against severability of an enactment.[79] However, in Australia, as in the United States, the legislature has used severability or saving clauses expressly to negative this presumption. The effect of such a clause is that if only part of a statute is invalid it does not necessarily follow that the whole statute will be invalid. The valid portion will still be given effect if it can be severed from the invalid portion.[80] There has been widespread use of severability clauses.[81]

---

76 G. Sawer, Australian Federalism in the Courts (1967), 113.

77 Idem.

78 Irving v Nichimura (1907) S.C.L.R. 233.

79 Kalibia Owners v Wilson (1910) 11 C.L.R. 689. For a treatment of this subject, see pp.340 et seq., post.

80 Cf. Kalibia Owners v Wilson, supra, and New Castle and Hunter River Steamship Co. Ltd v Attorney-General of the Commonwealth (1921) 29 C.L.R. 357. In both these cases Commonwealth legislation sought to regulate employment and other conditions in the maritime "coasting trade". The court held that the Commonwealth could deal only with the part of the coasting trade which was inter-state. In the former case there was no severability clause and the whole Act was held invalid; whereas in the second case the Act was held invalid in relation to the inter-state coasting trade as a result of severability clause.

81 As to limitations to severability clauses, see Sawer, op. cit., 114-116 and Wynes, op. cit., 48 - 53.

The Australian Constitution is another instance of a written constitution having no Bill of Rights. There are, however certain provisions in the Constitution, which operate to protect individual rights by imposing limitations upon legislative power.[82]

Canada

Canada, like the United States and Australia, has a federal system of government. The British North America Act 1867 provides for a division of legislative power between the Dominion Parliament on the one hand and the provincial legislatures on the other.

Basically the Canadian system of judicial review is similar to that of the United States and Australia. The validity of any law may be questioned by the courts. In Canada too the courts have assumed the power to determine the validity of enactments by reference to the provisions of the British North America Act, even though there is no express provision to this effect in the Constitution Act. Thus either federal or provincial legislation may be declared ultra vires the legislature concerned if it invades a field of legislation reserved by the Constitution Act to the other level of government.[83]

However, the scope of judicial review is narrower in Canada

---

82 E.g., s. 116 (freedom of religion); s. 51 (xxxi) right to compensation for acquisition of property by the State; s. 92 (freedom of trade and commerce). Cf. Commonwealth v Bank of New South Wales [1950] A.C. 235.

83 Attorney-General of Canada v Attorney-General of Ontario [1937] A.C. 355; Attorney-General of Canada v Attorney-General of Ontario [1937] A.C. 326; Hammerstein v British Columbia Coast Vegetable Marketing Board et al (1962) 37 D.L.R. (2d) 153.

than in the United States inasmuch as the Constitution Act contains no list of individual guarantees. Canada has no constitutional Bill of Rights similar to that in the United States but there are nonetheless limited constitutional guarantees; for instance, those requiring separate schools and the use of French and English languages in the courts and legislatures of the Dominion and of Quebec.[84] Accordingly, the task of the courts has been confined to the scrutiny of the legislative competence of the legislatures.[85] In 1960 the Federal Parliament did enact a Bill of Rights[86] but the purely statutory status of these guarantees means that they are not binding upon the legislature.[87] As a consequence civil liberties in Canada are at the mercy of legislative contradiction. Even the provisions of the Bill of Rights Act can be overcome by properly drafted legislation. The provisions of the Canadian Act may none-

---

84 British North America Act 1867, ss. 93 and 133.

85 Attorney-General for Ontario v Attorney-General for Canada [1912] A.C. 571.

86 S.C. 1960, c. 44. Saskatchewan also adopted a Bill of Rights in 1947 (1947, c. 35, now R.S.S. 1953, c. 345).

87 The Federal Act provides that,

> Every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe ... any of the rights or freedoms herein recognised and declared.

For an excellent discourse on the Canadian Bill of Rights, see W.S. Tarnopolsky, The Canadian Bill of Rights (1966). See also Bora Laskin, "Canadian Bill of Rights: A Dilemma for the Courts?" (1962) 11 Int. & Comp. L.Q. 519, V.K. Bhardway, "Canada and Entrenched Bill of Rights: A Visitor's View-point", (1972) 14 Journal of Ind. L. Inst. 187; P. Brett, "Reflection on the Canadian Bill of Rights." (1969) 7 Alberta L. Rev. 294; Louis Philippe Pigeon, "Bill of Rights and the British North America Act" (1959) 37 Can.B. Rev. 66; K.W. Cheung, "The Abortion Decision - A Qualified Constitutional Right in the United States: Whither Canada?". (1973) Can. B. Rev. 643; R.N. McLaughlin, "Canadian Bill of Rights - R v Smythe - 'Equality Before the Law' - The Meaning of 'Discrimination' ", (1973) Can. B. Rev. 517; A.A. Borovoy, "Civil Liberties In the Imminent Hereafter," (1973) Can. B. Rev. 93.

theless serve in future as a basis for developing a system of judicial review to protect individual rights at the Federal level[88] and their invasion even by statutes.[89] Whereas in the United States certain kinds of governmental actions, whether federal or state, may be struck down as unconstitutional because they offend against the Bill of Rights; in Canada the legal question is, which level of government (federal or provincial) has the constitutional power to deal with matters involving civil liberty.[90]

It may also be mentioned that since the abolition of appeals to the Privy Council by the Supreme Court Act, 1949, the Supreme Court of Canada has become the final court of appeal in all cases, including those involving constitutional questions.

New Zealand

The battle over the power of judicial review has been fought in other countries such as South Africa,[91] Ceylon,[92] and to a

---

88 As it has been held that this Dominion Act does not apply to the provincial governments: Re Williams and Williams [1961] O.R. 657, 600, 29 D.L.R. (2d) 107, 110 (C.A.).

89 See R v Drybones (1967) 64 D.L.R. (2d) 260 and R v Morgentaler (No. 1) (1974) 42 D.L.R. (3d) 424.

90 For a brief survey of the comparative position of the two federal constitutions of United States and Canada, see Bora Laskin, "The Constitutional Systems of Canada and the United States; Some Comparisons", (1966 - 1967) 16 Buffalo L. Rev. 591.

91 Harris v Donges [1952] 1 T.L.R. 1245, discussed at pp.196 et seq, post.

92 Bribery Commissioner v Ranasighe [1964] A.C. 172, discussed at pp.201, et seq., post. This case must be read in the light of the new constitution of the Republic of Sri Lanka (previously Ceylon).

limited extent in New Zealand.[93] As far as New Zealand is concerned, it is submitted that there is no power of judicial review of legislation in respect of any legislation enacted since 1947 at the very latest. In 1968 the New Zealand Supreme Court held that the legislative powers possessed by the New Zealand Parliament[94] were not as wide as those possessed by Parliament of the United Kingdom, and laws passed by it could, in proper cases, be challenged as being ultra vires.[95] In view of the doubts so expressed on the strength and scope of the legislative powers of the New Zealand legislature, the Constitution Act was amended in 1973[96] so as to remove any remaining restrictions on the legislative competence of the New Zealand Parliament. It can now be asserted with confidence that the Parliament of New Zealand is subject to no constitutional limitations whatsoever either as to substance or form of legislation. There is no Bill of Rights or similar protection for fundamental rights. The New Zealand Parliament has, it is submitted, the same legislative capacity as the Parliament of the United Kingdom. It can legislate on any subject matter, however unjust or discriminatory. No court is capable of reviewing New Zealand legislation passed since 1947 inasmuch as the 1973 amendment to the Constitution Act has a retrospective effect from 1947.[97]

---

93 R v Fineberg [1968] N.Z.L.R. 119, discussed at pp. 219 et seq., post.

94 Under s. 53 of the New Zealand Constitution Act 1852.

95 R v Fineberg, supra.

96 The Constitution Amendment Act 1973.

97 Ibid., s. 2.

Fiji

As has been seen[98] the Constitution of Fiji defines and establishes the principal organs of government. The Constitution is the source of their authority. It prescribes the manner in which and the limits within which their functions are to be exercised. It further determines their inter-relationship. Not only are there provisions protecting fundamental rights[99] and freedoms of the individual but there are also provisions which are so entrenched that they may be altered and/or repealed only by special legislative procedure.[1]

There are provisions in the Constitution which impose restrictions on the legislative authority of the Fiji Parliament.[2] More important, the Fiji Constitution is hierarchically superior to rules of law enacted by Parliament unless the legislation is passed in accordance with the provisions of the Constitution. This principle is explicitly stated in section 2 of the Constitution.[3] Thus in the present constitutional scheme of things it is imperative that some institution should exist to protect the very fabric of the Constitution and to ensure that the legislature and the executive will not connive to break the equilibrum.

Judicial review stands on a firmer ground in Fiji than in the United States. It has a more solid basis because it is founded not on any judicial pronouncement but on the Constitution itself. As has been seen the United States judiciary claimed that the principle of judicial review was an essential attribute of a "limited government". In Fiji, however, the framers of the Constitution not only

98 Pp.111 et seq., ante.

99 Ch. II of the Constitution.

1 Ss. 67 and 68.

2 E.g. ss. 5, 6, 8, 15, 52, 61, 67 and 68.

3 See p.120, ante.

believed that "limited government" was essential to democracy, but also enshrined in the Constitution itself the principle which Chief Justice John Marshall had to assume, namely, that the limitations imposed by the constitution upon the powers of the legislature must be respected and if the legislature violates these limitations, its acts must be void.[4]

Besides the express provisions of section 2 declaring the Constitution to be the supreme law of Fiji and making laws inconsistent with the Constitution pro tanto void, there are other sections in the Constitution which expressly confer on the Supreme Court original jurisdiction to hear applications alleging breaches of the constitutional provision.

Section 17 expressly confers jurisdiction on the Supreme Court to entertain applications for redress for breaches of the provisions of the Constitution

> and make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions

relating to fundamental rights and freedoms of the individual.

By section 97 original jurisdiction is expressly conferred upon the Supreme Court to hear applications and grant relief

> if any person alleges that any provision of this Constitution (other than chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention ....

Under s. 98 (2) the Supreme Court has jurisdiction to hear applications for the interpretation of the Constitution.

---

4 Marbury v Madison 1 Cranch 137;

Thus we see that the power of the Courts to declare Acts of Parliament unconstitutional, while implied under other constitutions, has been set out in clear terms in the Fiji Constitution. The provisions of the Fiji Constitution, to use the words of Marshal C. J.[5]

> confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and the courts, as well as other departments are bound by that instrument.

There is no doubt whatsoever, it is submitted, that the Supreme Court of Fiji has competence, even the duty, to review legislation on the ground of constitutionality and to strike down as invalid any infringement of the Constitution. Thus judicial review in Fiji will basically consist of reconsiderations of the constitutional propriety of an Act of Parliament. The question whether the right of the Courts to review legislation derogates from the sovereignty of the Fiji Parliament accordingly becomes significant.

---

5 Ibid., 180.

Question of dimension for [illegible] obstruct

CHAPTER VI

SOVEREIGNTY OF PARLIAMENT AND

THE SUPREMACY OF THE CONSTITUTION

A. Introduction

The notion of "sovereignty" is really ambivalent in a legal context.

> Sovereignty is exercised in two directions. Internally it relates to the power of making and enforcing laws, externally, to freedom from outside control.[1]

In one sense it indicates sovereignty in the international sphere. In this sense it is descriptive of a state's position in international law and when one speaks of the sovereignty of a state in such a context, all one means is that there is an absence of subjection to outside control or authority. In other words, no other state may legally interfere in the internal affairs of that particular state. It was to this aspect of sovereignty that Centlivres C. J. referred when he stated:[2]

> [T] he only Legislature which is competent to pass laws binding in the Union is the Union Legislature. There is no other Legislature in the world that can pass laws which are enforceable by Courts of law in the Union .... [T] he Union is an autonomous State in no way subordinate to any other country in the world.

However, the criteria of sovereignty for international law may well be different from the concept of parliamentary sovereignty in the internal sphere. In international law the emphasis is on independence in the sense of absence of control or subjection to any outside authority, while parliamentary sovereignty in the internal order perhaps has more exacting requirements.[3]

---

1 R v Christian (1924) A.D. 101, 106, per Innes C.J.

2 Harris v Donges [1952] T.L.R. 1245, 1261; see also Ibralebbe v R. [1964] A.C. 900, 922.

3 C.F. Amerasinghe, "The Legal Sovereignty of the Ceylon Parliament" [1966] Pub. L. 65, 68; D.V. Cowen, "Legislature and Judiciary" (1952) 15 M.L.R. 282, 292.

The doctrine of parliamentary sovereignty has become a commonplace of English constitutional law. In a classic passage Dicey formulated the doctrine of parliamentary sovereignty thus:[4]

> The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament ... has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament.

Dicey's view is still widely accepted in writings on the British Constitution today.[5] In English jurisprudence the doctrine of sovereignty of Parliament is generally understood to mean the absence of any legal restraint upon the legislative powers of Parliament. This absence of legal restraint can be approached from two sides; and both these aspects were clearly asserted by Dicey.[6] In his exposition of the doctrine of parliamentary sovereignty in England, Dicey postulated two basic characteristics. The first is that Parliament has unlimited legislative competence. In other words, the United Kingdom Parliament is free to pass any

---

4 Dicey, op. cit., 39.

5 E.C.S. Wade, in the Introduction to Dicey, op. cit., xxxv, states that:

> Despite recent criticism, it is still true today as a proposition of the law of the United Kingdom to say that Parliament has the right to make or unmake any law whatever. Nor can any court within the United Kingdom set aside the provisions of an Act of Parliament.

See also H.W.R. Wade, "The Basis of Legal Sovereignty" (1955) Camb. L.J. 172. Cf. H.R. Gray, "The Sovereignty of Parliament Today" (1953) 10 U. Toronto L.J. 54.

6 Dicey, op. cit., Ch. 1. It is not intended to attempt to review or re-examine Dicey's theory.

legislation on any topic or subject-matter whatsoever. It cannot be legally limited or confined by any factor,[7] be it morality or natural law[8] or international law.[9] "Parliament could do anything ... being omnipotent".[10] The power of the United Kingdom Parliament to legislate is unrestrained and unrestricted from a legal point of view. However, from a political point of view, it may be assumed that Parliament will not ordinarily do anything contrary to the wishes of a strong and influential group.[11]

Dicey's second assertion is that there is no other authority or body (including the courts) which can question the validity of Parliament's legislation or override it or set it aside. Thus, as has been seen, in the United Kingom the courts have no jurisdiction to declare an Act of Parliament void as being ultra vires or "unconstitutional".[12] In the exercise of its power, Parliament may

---

7 However, there are conventional (as opposed to legal) rules which in practice do impose limitations. For instance, the doctrine of mandate; it is accepted that convention requires that a government consult interests likely to be affected by general legislation. As to this subject see J.D.B. Mitchell, Constitutional Law (2nd ed., 1966), 66.

8 Liversidge v Anderson [1942] A.C. 206, 261.

9 Mortensen v Peters (1906) 14 S.L.T. 227. However see n. 2, p 233, post.

10 Hammersmith Borough Council v Boundary Commission The Times, 15 December 1954, per Harman J. See also Lee v Bude and Torrington Railway (1871) L.R. 6 C.P. 576, 582; Institute of Patent Agents v Lockwood [1894] A.C. 347, 359; National Union of General and Municipal Workers v Gillian [1946] 1 K.B. 81, 85. Cf. Lord Cooper's strictures in MacCormick v Lord Advocate, [1953] S.C. 396, 413.

11 See Professor Wade in the introduction to Dicey, op. cit., xviii and Professor Sir Ivor Jennings, The Law and The Constitution (5th ed., 1959), 147.

12 See pp.159 et seq., ante. Cf. Gray, loc. cit., 54. The current discussion, however, must be seen subject to the obligations of the U.K. under the European Convention on Human Rights and the E.E.C. See comments in n. 2, p. 233, post.

make a law which is unreasonable, impolitic or contrary to moral principles,[13] without fear of judicial review. Similarly the courts are precluded from enquiring into the motives, or the influences that led to the passage of the Act in question.

Amongst jurists there are two areas of disagreement in relation to the doctrine of the sovereignty of Parliament: first, as to what is the juridical basis of parliamentary sovereignty and secondly, to what extent, if at all, can one Parliament bind succeeding Parliaments.

(1) Juridical Basis of Parliamentary Sovereignty

The English doctrine of parliamentary sovereignty is the theoretical response to the demand for some explanation of where the ultimate power in a national community lies. It can be thought of as posing the question, "what is the juridical basis of parliamentary sovereignty". This is the first area where theorists differ.

The first school[15] maintains that parliamentary sovereignty depends upon judicial determination in exactly the same way as any other question of law. Thus Professor Sir Ivor Jennings propounded that the law requires the courts to obey any rule enacted by the legislature, including a rule which alters the law itself.[16] Thus

---

13 Dicey, op. cit., 62; Jennings, op. cit., Ch. 4. The same power of course, belonged to a non sovereign legislature; R v Burah (1878) 3 A.C. 889; R v Hodge (1884) 9 A.C. 117.

14 Lee v Bude and Torrington Railway, supra; British Railway Board v Pickin. [1974] A.C. 765. See also The King v Barger (1906) 6 C.L.R. 41; Osborne v The Commonwealth (1911) 12 C.L.R. 321, at 346; Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1946] A.C. 308.

15 Which includes Professor Sir Ivor Jennings and Professor Hamish R. Gray.

16 Jennings, op. cit., 149.

referring to the supremacy of Parliament,[17] the learned author stated:[18]

> It is a legal concept, a form of expression which lawyers use to express the relations between Parliament and the courts. It means that the courts will always recognise as law the rules which Parliament makes by legislation; that is, rules made in the customary manner and expressed in the customary form.

This view was supported by Professor H. R. Gray when he stated that:[19]

> Parliamentary sovereignty (which is, after all, legislative sovereignty) depends on judicial determination in exactly the same way as any other question of law.

The learned author further stated:[20]

> [T] he true reason for parliamentary sovereignty is to be found in the fact that the courts recognise its existence as a legal doctrine. This recognition has arisen as the result of a self-denying ordinance on the part of the courts, who as a matter of constitutional practice accept and apply new laws when presented to them in a particular form, that is to say, an Act of Parliament.

The opposing view that the true basis of the sovereignty of Parliament,

---

17 Professor Sir Ivor Jennings prefers the term "supremacy" rather than "sovereignty" of Parliament. "Sovereignty" he states, "is a word of quasi-theological origin which may easily lead us into difficulties"; Jennings, op. cit., 147.

18 Ibid., 149. See generally ibid., 144 et seq.

19 Gray, loc. cit., 54. For a similar view see W. Friedmann, "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950) 24 Aust. L. J. 103, 104; Keir and Lawson, Cases in Constitutional Law (4th ed., 1954)7.

20 Gray, loc. cit., 58.

as understood in British constitutional law, is that it is a political fact which can only be changed by revolution. Thus Professor H. W. R. Wade stated:[21]

> What Salmond calls the 'ultimate legal principle' is therefore a rule which is unique in being unchangeable by Parliament - it is changed by revolution, not by legislation; it lies in the keeping of the courts, and no Act of Parliament can take it from them. This is only another way of saying that it is always for the courts, in the last resort, to say what is a valid Act of Parliament; and that the decision of this question is not determined by any rule of law which can be laid down or altered by any authority outside the courts. It is simply a political fact. If this is accepted, there is a fallacy in Jennings' argument that the law requires the courts to obey any rule enacted by the legislature, including a rule which alters this law itself. For this itself is ultimate and unalterable by any legal authority.

These are basically the two views.[22]

---

21 "The Basis of Legal Sovereignty", (1955) Camb. L. J. 172, 189. As to the question of sovereignty of Parliament see further B. Beinart, "Parliament and the Courts" (1954) S. A. L. R. 135; K. W. B. Middleton, "Sovereignty in Theory and Practice" (1952) 64 Jurid, Rev. 135; G. Marshall, Parliamentary Sovereignty and the Commonwealth (1957); R. F. V. Heuston, Essays in Constitutional Law (2nd ed., 1964), Ch. 1; J. D. B. Mitchell, "Sovereignty of Parliament - Yet Again" (1963) 79 L. O. R. 196; M. A. Fazal, "Entrenched Rights and Parliamentary Sovereignty" (1974) Pub. Law. 295.

22 As will be discovered later, in the constitutional set up of Fiji, there is very little room for the varying views on the sovereignty or supremacy of the Parliament as they are known in English jurisprudence. As will be seen (see pp. 210 et seq., post), in Fiji there is constitutional supremacy. Hence an analysis of the divergent views regarding the English Parliament or other legislatures (e. g. New Zealand) would be an academic exercise with little relevance to Fiji. See also n. 33 p.195 , post.

(2) To What Extent Can Parliament Bind Its Successors

Here again there are two conflicting views. Professor H. R. Gray maintained that the United Kingdom Parliament is capable of binding its successors by two types of legislation viz., legislation affecting the existence, constitution or composition of Parliament itself and legislation dealing with the procedure of law-making.[23] This view is supported by Professor Sir Ivor Jennings.[24] According to the argument of Professor Jennings if there is a requirement that a statute to be enacted must be approved by say, a referendum or some outside body or a two-thirds majority in the legislature, that would constitute, not a procedural requirement, but a change in the composition of Parliament. Thus it would be binding on the legislature.

Similarly, Professor D. V. Cowen has argued that a requirement such as a special majority in either or both Houses of Parliament would constitute redefinition of "Parliament" for this purpose; so that in the case proposed above, "Parliament" would mean the Queen, the Lords, and the Commons approving by the stated majority. Professor Cowen draws a distinction between the "static" and "dynamic" concepts which correspond to structure and function.[25] The static concept has reference to the structure of Parliament, that is, to the elements which constitute it. The dynamic concept refers to the constituent

---

23 Gray, loc. cit., 60 et seq.

24 Jennings, op. cit., 152 et seq.

25 D. V. Cowen, Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act (1951), 5. For a further comprehensive treatment of this subject by the same author see "Legislature and Judiciary" (1952) 15 M. L. R. 282 and (1953) 16 M. L. R. 273.

elements of Parliament functioning as a law-making body. He points out:[26]

> [I]t is a fundamental legal principle that in all cases where legislative power is vested not in one person, but in a number of persons, that number must combine for action in accordance with certain rules prescribing the manner in which their will is to be ascertained. And this principle applies even to sovereign law-making bodies.

The learned author's conclusion is that the constituent elements of Parliament are bound to observe the rules which for the time being govern the method of law-making. He asserts that this conclusion is not incompatible with parliamentary sovereignty inasmuch as there are binding rules of law imposed or enacted by itself governing the structure and mode of functioning of Parliament.[27]

On the other hand, Dicey describes the problem as an "alleged legal limitation" and summarily dismisses the idea that one Parliament may be bound by the acts of its predecessors.[28] H.W.R. Wade supports Dicey and regards the proposition that one Parliament cannot bind its successors in any form whatsoever as an "obvious" legal proposition.[29] He maintains that no Act of the sovereign legislature (composed of the Queen, Lords and Commons) could be invalid in the eyes of the courts. That is, it is always open to the legislature, so constituted, to repeal any previous legislation and it is an invariable rule that in case of

---

26 Op. cit., 6. See also J.C. Gray, The Nature and Sources of Law (2nd ed. 1931), 76.

27 Cowen, (1953) 16 M.L.R. 273, 290.

28 Dicey, op. cit., 64.

29 H.W.R. Wade, loc. cit., 5.

conflict between Acts of Parliament, the latter repeals the earlier, and that the legislature has only one process for enacting sovereign legislation. He maintains that the only limitation to Parliament's legal power is that it cannot detract from its own continuing sovereignty; and that Parliament's power is unalienable in the United Kingdom.[30]

Hood Phillips is of the same opinion as H. W. R. Wade.[31] Thus the learned author states:[32]

> As a matter of logic and law, a legislature cannot bind itself - whether as to subject-matter or the manner and form of legislation - unless it is directed or empowered to do so by some 'higher law', that is, some (logically and historically) prior law not laid down by itself.[33]

B. The Position in the Commonwealth as Regards "Manner and Form"

The question arises as to what influence, if any, did British juridical theory of the sovereignty or supremacy of Parliament have within the Commonwealth. At the outset, it is submitted, the Commonwealth experience shows that the Parliaments of the Commonwealth countries are not as powerful or as absolute as

---

30 Idem.

31 Hood Phillips, Constitutional Law (5th ed., 1973), 66 - 76.

32 Ibid., 75.

33 It is not intended to enter into an examination and analysis of the divergent views hitherto stated for the reasons stated in n. 22 p.192, ante. In Fiji there is a written constitution which defines the manner in which the legislative bodies are to operate. Hence to enact legislation, or even to amend such procedures as defined by the Constitution, as will be seen (see pp. 206 et seq., post) the Fiji Parliament is bound to follow the procedures specified by the Constitution. Hence these opposing views will not be analysed further.

the Parliament of which Dicey wrote. A state may be sovereign and yet have a legislature which is not unlimited and its legislation may be subject to judicial review. Thus the case Harris v Donges [34] represents an important stage in the process of delimitation of the legal doctrine of parliamentary sovereignty; it was a recognition by a Commonwealth Court (as it then was) of the principle that the powers of a sovereign legislature may be legally limited by the requirements of "manner and form".

In this case a South African Court was asked to adjudicate upon the validity of an Act passed by the South African legislature. The South Africa Act, 1909, provided that certain sections of that Act could be changed only by a statute passed with a specially prescribed majority. These were known as the "entrenched sections". The two which directly concerned the case at hand were sections 35 and 152. [35] In 1951 the Separate Representation of Voters Act was passed by the House of Assembly and the Senate sitting separately. It also received the Governor-General's assent and was therefore officially enrolled. When the validity of this Act of 1951 was questioned the court had to decide two issues. The first concerned the structure, mode of legislation and powers of the Union Parliament. Secondly, it had to decide the relationship between the Court and the Parliament.

---

34 [1952] T. L. R. 1245.

35 S. 35 required the passage of such an Act by a joint sitting of the two Houses and on the third reading to secure a majority of at least two-thirds of the members at such joint sitting.

S. 152 was the amendment section, and it too required that a bill amending the provisions, inter alia, of section 35 to be passed in the same way - that is to be at a joint sitting and to secure the support of at least two-thirds of the members present.

It was contended for the Minister, in support of the Act, that the answer to the questions raised was determined by the doctrine of parliamentary sovereignty in the United Kingdom. It was argued that the Union Parliament had been created as an exact replica of the United Kingdom Parliament except that prior to the passing of the Statute of Westminster there existed certain fetters upon the legislative powers of the Union Parliament, including the fetters of the entrenched provisions. After 1931 all the fetters on the legislative powers were removed and the courts in South Africa were in exactly the same position as English courts in relation to parliamentary legislation. In other words, they could not question the validity of an Act of the Union Parliament, in this case the 1951 Act.

The Court, in rejecting the argument, said [36] that the contention

> seems to me to be based on the fallacy that a Dominion Parliament must necessarily be a replica of the British Parliament, despite the fact that all Dominion Parliaments have Constitutions which define the manner in which they must function as legislative bodies. There is nothing in the Statute of Westminster which in any way suggests that a Dominion Parliament should be regarded as if it were in the same position as the British Parliament.

Thus the Court accepted, contrary to the argument of the Minister, that the Union Parliament was different from the British Parliament. The Court seems to have laid stress on the fact that the Union Parliament was created by a specific document, namely the South Africa Act which was a statute of the United Kingdom Parliament.

Having observed that[37] "all Dominion Parliaments have

---

36 [1952] 1 T.L.R. 1245, 1258, per Centlivres, C.J.

37 Idem.

Constitutions which define the manner in which they must function as legislative bodies", the learned judge stated:[38]

> It is that Act [the South Africa Act] and not the Statute of Westminster which prescribes the manner in which the constituent elements of Parliament must function for the purpose of passing legislation. While the Statute of Westminster confers further powers on the Parliament of the Union, it in no way prescribes how that Parliament must function in exercising those powers.

The Court made it clear that it was by reference to the exact terms of that document, namely the South Africa Act 1909 (i.e. the Constitution) that the question in issue had to be resolved. The Court further stated that[39] "it is clear that Parliament means Parliament functioning in accordance with the South Africa Act".

The Court thus held that the South African Parliament differed from the Imperial Parliament in regard to both its powers and the mode of legislation. It was the latter difference that was really the decisive issue in this case. The Court recognised that, having regard to the position of the Union Parliament at the time of its inception, the provisions of the entrenched sections were part of the definition of the Union Parliament and not a limitation upon the powers of an exclusively bicameral Parliament, which could be assumed to function in the same way as the United Kingdom Parliament. The learned Chief Justice said:[40]

> In my opinion one is doing no violence to language when one regards the word 'Parliament' as meaning Parliament sitting either bicamerally or unicamerally

---

38 Ibid., 1259. (Emphasis added).
39 Idem.
40 Ibid., 1258.

> in accordance with the requirements of the South Africa Act .... There is, in my opinion no justification for reading the words 'Parliament of a Dominion' in the statute as meaning, in relation to the Union, Parliament functioning only bicamerally.

The Court then went on to inquire whether the Statute of Westminster had in any way altered the Union Parliament's method of enacting valid legislation. It was held that the Statute of Westminster did not change the definition and mode of legislation of the Union Parliament as set out in the South Africa Act. Having arrived at the conclusion that the entrenched sections had been left intact by the Statute of Westminster, the Court was of the opinion that it had the necessary powers and accordingly held the whole of the 1951 Act to be invalid as not having been passed in the manner and form provided for by the entrenched provisions of the South Africa Act 1909.

This decision, it is submitted, is in conformity with the principles propounded by the Privy Council in McCawley v The King.[41] In that case Lord Birkenhead L. C. in delivering the judgement of the Privy Council stated:[42]

> The first point which requires consideration depends upon the distinction between constitutions the terms of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some special formality, and in some cases by a specially convened assembly.

His Lordship called the former types of constitution "uncontrolled" and the latter "controlled". However, his Lordship did observe:[43]

---

41 [1920] A.C. 691.

42 Ibid., 703. (Emphasis added).

43 Ibid., 704.

> Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision.

This was a case where a Queensland statute, passed by the ordinary process, conflicted with the Constitution Act 1867. It was held that the Constitution placed no restriction on the manner in which or the extent to which the law-making power could be exercised. It was recognised, however, that a Constitution may impose limitations as to the powers of the legislature in enacting laws. It is submitted that the Privy Council accepted that had there been conditions attached to the law-making powers of the Legislature of Queensland, the Legislature would not have been able to ignore them and the decision would have been different.

This was the position in the case of Attorney-General for New South Wales v Trethowan.[44] The Constitution Act 1902, enacted by the legislature of New South Wales, was amended in 1929, by adding section 7A, which provided that no Bill for abolishing the Legislative Council should be presented to the Governor for assent until it had been approved by a majority of the electors voting upon a submission to them made in accordance with the section. The same provision was to apply to a Bill to repeal the section. In 1930 both Houses of the Legislature passed two bills, one to repeal section 7A and the other to abolish the Legislative Council. It was intended to present the Bills for

---

44 [1932] A.C. 526.

assent.

By section 5 of the Colonial Laws Validity Act 1865, the legislature of the State had full power to make laws regarding the constitution, powers and procedure of the Legislature, provided the laws were passed in such "manner and form" as might from time to time be prescribed by any Act of Parliament, Letters Patent, Order in Council, or Colonial law in force in the Colony. It was held by the Judicial Committee that the whole of section 7A of the Constitution Act 1902 was within the competence of the legislature of the State under section 5 of the Colonial Laws Validity Act 1865, and that the provision that Bills of that nature must be approved by the electors before being presented was a provision as to "manner and form" within the meaning of the proviso of the said section 5. Accordingly, it was held that the Bills could not lawfully be presented unless and until they had been approved by a majority of the electors.

It is submitted that although the question in that case related to a subordinate legislature, the principle is of general application in respect of "controlled" legislatures where there are specific constitutional provisions or conditions governing the manner and form of legislation.

This question relating to the manner and form of legislation came squarely before the Judicial Committee in a direct way in 1964 in respect of the "sovereign" legislature of Ceylon (as it then was). This was the case of Bribery Commissioner v Ranasinghe.[45] This decision is of utmost importance to the Dominion of Fiji, not only because it concerns a "controlled" legislature analagous to Fiji's but also because the Judicial Committee which decided it is the ultimate judicial authority

---

45 [1965] A.C. 172.

as far as Fiji is concerned. Accordingly it warrants a close examination.

The Constitution of Ceylon (as it stood in 1964)[46] could only be amended in accordance with section 29(4) thereof, the substance of which was that an amendment required an endorsement of a certificate by the Speaker that the number of votes cast in favour of the amendment in the House of Representatives amounted to not less than two-thirds of its members. The certificate was to be conclusive evidence thereof and could not be questioned in any court of law.

The Bribery Act 1954 established a system of tribunals for the trial of public servants on charges of corruption and since this was thought to be an amendment to the Constitution in that the members of the tribunals were not appointed by the Judicial Service Commission (the constitutional body charged by section 55 of the Constitution with the duty of appointing judicial officers) this Act was passed by the special procedure prescribed by section 29(4). The Bribery Act also specified that

> (1) Every provision of this Act which may be in conflict or inconsistent with anything in the Ceylon (Constitution) Order in Council, 1946 shall for all purposes and in all respects be as valid and effectual as though that provision were in an Act for the amendment of that Order....
>
> (2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail.

In 1958 the Bribery Amendment Act was passed. It provided for the setting up of special Bribery Tribunals the members of

---

46 The provision has no application since Ceylon became a Republic in 1970.

which were appointed by the Governor-General instead of the Judicial Service Commission as was provided for by the Constitution. Henceforth all bribery prosecutions were to be heard by these tribunals instead of by the ordinary courts. This Act of 1958 was not passed by the special procedure prescribed by section 29 (4) of the Constitution but by the ordinary process. The question for determination was whether the members of the tribunal appointed under the 1958 Act by the Governor-General and not the Judicial Service Commission as required by the Constitution, were lawfully appointed.

The Supreme Court of Ceylon held that the members of the Tribunal were judicial officers and that they were not lawfully appointed. The Privy Council affirmed the decision of the Supreme Court and held that the 1958 Amendment Act was in conflict with the provisions of the Constitution relating to the appointment of judicial officers and since it was not passed by the special procedure prescribed under the section 29 (4) it was void to the extent of such conflict. This was so despite the fact that the 1958 Act was expressly said to be an amendment of the 1954 Act which was itself passed by the special procedure prescribed by section 29 (4). In this case the Judicial Committee posed the pertinent question: [47]

> When a sovereign Parliament has purported to enact a Bill and it has received the Royal Assent, is it a valid Act in the course of whose passing there was a procedural defect, or is it an invalid Act which Parliament had no power to pass in the manner?

The Bribery Commissioner argued that if an Act had been passed by both Houses of Parliament and received the Royal

---

47 [1965] A.C. 172, 196.

Assent, it was a valid enactment and had the full force of law. It was said that a defect in procedure did not make the Act invalid in view of the fact that the Ceylon Parliament was a sovereign legislature. It was contended that section 29 (4) - which required the special procedure of enactment - was clearly only a procedural requirement in relation to the exercise of the legislative power and was not a requirement which affected legislative competence. The argument concluded with the assertion that once a Bill had received the Royal Assent, it was no longer competent for the courts (except in cases of express provisions like sections 29 (2) and 29 (3))to go behind the question of the assent so given.

Their Lordships' answer, after referring to McCawley v The King,[48] was that:[49]

> [A] legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make law. This restriction exists independently of the question whether the legislature is sovereign ... or whether the Constitution is 'uncontrolled'....

Further, their Lordships stated:[50]

> Such a Constitution can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or amendment may include the change or abolition of those very provisions. But the proposition which is not acceptable is that a legislature, once established, has some inherent power derived from the mere fact of its establishment to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not

---

48 Supra.

49 [1965] A.C. 172, 197.

50 Ibid., 198.

> be a valid law unless made by a different type of majority or by a different legislative process.

Their Lordships distinguished McCawley's case thus:[51]

> There the legislature, having full power to make laws by a majority, except upon one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the Constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass upon the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with section 55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the Constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in section 29 (4), the Ceylon legislature, has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under section 2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its section 9, namely compelled to operate a special procedure in order to achieve the desired result.

The Commonwealth experience therefore shows that a Parliament can be bound by the manner and form of the legislative process, depending on whether it is a "controlled" or "uncontrolled" legislature. Hence a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates that body's power to make laws. As has been seen, a legislature does not have inherent power, from the mere fact of its establishment, to legislate by ordinary process

---

51 Ibid., 198.

in relation to a matter on which its own constituent instrument requires that to be valid the law must be adopted by a different type of majority or by a different legislative process.

With this background, it may be useful to examine the position in Fiji as regards the manner and form of legislation.

The Position in Fiji as Regards "Manner and Form"

The Fiji Constitution is "controlled". The major provisions thereof may be modified, repealed or altered only after compliance with the special formality prescribed by sections 67 and 68 of the Constitution. Whether the United Kingdom Parliament could or could not fetter itself by providing for new rules regarding the process of law-making, is irrelevant to Fiji where we are concerned with a different state of affairs. We are not concerned with rules made by the Fiji Parliament prescribing the process of law-making. On the contrary, we are concerned with the case of a Parliament which was validly fettered in the process of law-making by the prescription[52] of another body[53] which was superior to the Fiji legislature at the time of its "enactment". It was this very "enactment" which gave birth to the Fiji Parliament and which prescribes the rules regarding the manner and form of legislation.

As has been said[54] a Parliament can be measured against

---

52 Fiji became an independent Dominion by the Fiji Independence Act 1970 (U.K.). The Constitution is scheduled to the Fiji Independence Order, being an Order made by The Queen's Most Excellent Majesty in Council.

53 The United Kingdom Parliament and the Queen in Council.

54 Pp.193 et seq., ante.

two concepts - the "static" and the "dynamic".[55] Section 30 of the Constitution of Fiji describes the Fiji Parliament as ordinarily constituted - that is Her Majesty, a House of Representatives and a Senate. This is classed as a "static" concept, section 30 having defined the structure of Parliament. However, there is a functional distribution of powers of legislation when one sees the Fiji Parliament as a "dynamic" concept, that is as a law-making body. There are provisions in the Constitution, as will be presently seen, which prescribe the rules regarding the manner of legislation. The rules so made are part of the "dynamic" concept of the Fiji Parliament as it was created by the Constitution. This is the functional aspect of Parliament. Thus ordinarily, a bill passed by both Houses of Parliament and assented to by the Governor-General on behalf of Her Majesty, becomes law.[56] In such cases an ordinary majority is required in each House.[57]

When, however, the subject-matter of legislation falls within the entrenched sections,[58] one of four different procedures have to be adopted by both Houses of Parliament, depending on which part of the entrenched sections are to be amended.

(1) Any legislation affecting the first type of entrenched matter must be passed by both Houses of Parliament and be supported at the third reading in each House by not less than three-quarters of all the members of each House.[59]

---

55 Professor Cowen's terms discussed at p.193, ante, are adopted here.

56 Constitution, s. 53.

57 Ibid., s. 59; but certain measures falling within s. 61 to 65 preclude the Senate from refusing to pass the measures referred therein, see p.122, ante.

58 Ibid., ss. 67 and 68.

59 Ibid., ss. 67 (2) and 68 (1).

(2) Any legislation affecting the second type of entrenched matter must be passed by both Houses of Parliament and be supported at the third reading in each House by not less than two-thirds of all the members of each House.[60]

(3) Any legislation affecting the third type of entrenched matter must not be passed until three months after there has been laid before each House of Parliament a copy of a report of a Royal Commission appointed after the first general election of members of the House of Representatives held after 10 October 1970[61] for the purpose of making recommendations as to the most appropriate method of electing members of the House of Representatives. In addition to this requirement, if a bill comes before the Houses touching the subject-matter so entrenched, then in each House the bill must be supported at the third reading by three-quarters of all the members of the House.[62]

(4) Any legislation affecting the fourth type of entrenched matter must be supported at the third reading by not less than three-quarters of all the members of each House. In addition to this requirement, at least six of the eight members of the Senate who are nominated by the Governor-General, acting on the advice of the Great Council of Chiefs,[63] must at the third reading also

---

60 Ibid., s. 67 (3).

61 The date when the Constitution came into force.

62 Constitution, s 67 (4).

63 The Senate consists of twenty-two members appointed under s. 45 (1) of the Constitution, being:
(a) Eight appointed by the Governor-General acting in accordance with the advice of the Great Council of Chiefs;
(b) Seven appointed by the Governor-General acting in accordance with the advice of the Prime Minister;
(c) Six appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition; and
(d) One appointed by the Governor-General acting in accordance with the advice of the Council of Rotuma.

support the proposed legislation.[64]

To legislate validly on these subjects the Fiji Parliament is legally bound to follow one of the procedures prescribed in the entrenched sections.[65]

This may best be illustrated by an example. Under section 68 (2) of the Constitution, a bill to amend the Native Land Trust Board Ordinance affecting native land falls within the subjects entrenched by that section. Under section 12 of the Native Land Trust Board Ordinance a lessee of native land cannot mortgage his land without the consent of the Native Land Trust Board. Suppose a Bill were presented to Parliament exempting from section 12 all mortgages where the consideration does not exceed $100.00. Such a Bill must secure at the third reading the support of not less than three-quarters of all the members of the House of Representatives. In the Senate the Bill must secure at the third reading the support of both (a) three-quarters of all members, and (b) at least six of the eight Senators who were nominated by the Governor-General on the advice of the Great Council of Chiefs.[66] Thus, if all the fifty two members of the House of Representatives[67] support the Bill and nineteen of the twenty-two members of the Senate support it, but the three remaining members of the Senate opposing the Bill happen to be Senators nominated on the advice of the Great Council of Chiefs the Bill cannot be adopted because the manner

---

64 Constitution, s. 67 (5) and 68 (2).

65 Bribery Commissioner v Ranasinghe [1965] A.C. 172; Harris v Donges [1952] T.L.R. 1245; Attorney-General for New South Wales v Trethowan [1932] A.C. 526; McCawley v The King [1920] A.C. 691.

66 See n. 63, p.208, ante.

67 There are 52 members in the House of Representatives (Constitution s. 32) and 22 members in the Senate (Constitution s. 45).

and form provisions of sections 67 and 68 would not have been complied with.

Accordingly, it is submitted that since a legislature has no power to ignore the conditions of law-making imposed by the instrument which itself regulates the legislature's power to make laws, the Fiji Parliament is bound to follow the "manner and form" of legislation provided for by the Constitution.[68] Also, it has already been seen that the validity of the legislation can be questioned by the courts and declared void. This obviously cuts across at least one of the basic characteristics postulated by Dicey regarding parliamentary sovereignty in the United Kingdom. Hence one is left with the problem of defining sovereignty and identifying the sovereign in Fiji.

D. The Question of Sovereignty in Fiji

(1) General

In discussing the "supremacy" or "sovereignty" of Parliament in relation to Fiji, a distinction must be drawn between legislative supremacy and constitutional supremacy.

In the United Kingdom legislative sovereignty resides in Parliament. This location of sovereignty, it is submitted, is not a universal characteristic of the constitutions of the world. It is a peculiar accident of English history. The doctrine of legislative supremacy developed in England without any written constitution or any comparable fundamental law under which the validity of a statute could be judged. As has been seen,[69] Parliament established

68 See pp.206 et seq., ante.

69 Pp.161 et seq., ante, and pp.277 et seq., post.

itself as the sole legislative authority in England by the end of the Tudor period after a long struggle with the Crown. During the Stuart period the Commons provided the impetus for the popular movement against absolute monarchy. The Commons contested the royal claim to sovereignty, and the contest was decided in favour of Parliament by the ensuing Civil War and the Revolution.[70] It has already been seen that Parliament in England is supreme in that statutes affecting constitutional rights stand on no higher footing than other enactments. Parliament may enact, amend or repeal any statute dealing with any subject-matter whatsoever, in the same manner as ordinary legislation. In other words, there is no legal limitation upon the legislative powers of the English Parliament.

Constitutional supremacy, on the other hand, is a doctrine applied to written constitutions which create the various organs of government and mark out the limits of their respective powers, including those of the legislature. It also determines the interrelationship of the various principal organs of government. All such organs, including the legislature, are bound to observe the provisions of the Constitution. All their actions and exercises of powers are tested against the provisions of the Constitution. In this sense it is a body of fundamental laws. Also it is hierarchically superior to rules of law enacted by the legislature except in so far as those rules have been made in conformity with the provisions of the Constitution, as regards both the content and the manner and form of legislation.

It is in this context that the question whether the Fiji Parliament is as powerful and as absolute as the Parliament described by Dicey must be answered. At the outset, it must be realised that the Fiji Parliament is a creature of the Constitution and accordingly enjoys only such powers as the Constitution has bestowed upon it.

---

70 Anson, op. cit., Chs. 2, 6 - 9 and pp.153 - 198; Fielden, op. cit., Chs, 2 - 5.

One of the basic attributes of sovereignty or supremacy of Parliament, as understood in English jurisprudence, is the power to enact legislation on any subject-matter whatsoever.[71] Cases such as Harris v Donges[72] have accepted limitations as to the manner and form of legislation being created by a Constitution, but they have not established that Parliament was limited in its legislative powers as regards the content of legislation. It is submitted that it is on this latter point that the Fiji Parliament diverges from its United Kingdom counterpart.

Historically, there were certain legal limitations on the powers of Fiji's colonial legislature. These included its legislative incapacity under the doctrine of repugnancy as contained in the Colonial Laws Validity Act 1865 and the uncertain scope of the doctrine invalidating legislation having extra-territorial effect.[73] These limitations, however, were removed by the Fiji Independence Act 1970.[74]

Since 10 October 1970, the legislative power of Fiji's Parliament is derived from the Constitution creating it. Accordingly, the Fiji Parliament can do nothing beyond the limits, if any, set by the Constitution. Legislative power is conferred by section 52 of the Constitution which provides:

> Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Fiji.

Thus, in the exercise of its ordinary power to legislate, the Fiji Parliament is subject to two limitations:

(i) The legislation must not infringe the provisions of the

---

71 Pp.188 et seq., ante.

72 [1952] T.L.R. 1245.

73 See Appendix I, p. 717 , post.

74 Ss. 1, 2, 3 and 4 of First Schedule to the Act.

Constitution.

(ii) The apparent limitation that legislation must be for "the peace, order and good government of Fiji" and no other purpose.

(2) Legislation must not infringe the provisions of the Constitution

The first chapter of the Constitution makes provision for the supremacy of the Constitution over all other laws. Section 2 expressly provides for the Constitution being the supreme law of the land and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.

Chapter III of the Constitution contains provisions for the protection of fundamental rights and freedoms of the individual.[75] Accordingly Parliament in Fiji cannot make a law in contravention of the fundamental rights and freedoms provided for in the Constitution. Section 15 expressly prohibits the enactment of any law that is discriminatory either of itself or in its effects. Any legislation which so contravenes this provision shall to the extent of its inconsistency with this provision be void.[76]

Sovereignty necessarily implies a power to confer and take away citizenship. On this matter the Parliament of Fiji has been given very wide powers in section 25 of the Constitution. Wide though the powers may be, they are not as unfettered as the powers of the British Parliament. One obvious check on the power is imposed by section 25 (b) of the Constitution.[77] For instance, Parliament may not deprive a person of his Fiji citizenship if that

---

75 They are equivalent to a comprehensive Bill of Rights.

76 Cf. Akar v Attorney-General for Sierra Leone [1970] A.C. 853.

77 S. 25 (b) provides:
Parliament may make provision ...
(b) for depriving of his citizenship of Fiji any person who is a citizen of Fiji otherwise than by virtue of section 19, 20 (2), 21 or 22 of the Constitution;

person was born in Fiji and was a citizen of the United Kingdom and Colonies before 9 October 1970.[78] In addition, Parliament in Fiji cannot make a law with respect to the termination of citizenship which would make an invidious discrimination between one citizen and another in like circumstances.[79] These show that the power with respect to termination of citizenship, though apparently very wide, is not without limitation. These are merely illustrations of the limitations on the power of the Fiji Parliament in relation to the content of legislation. There are other limitations.[80]

Even within its own legal sphere of activity the Parliament of Fiji is not free from outside control. The Supreme Court of Fiji can question the reasonableness or desirability of laws in certain spheres. For instance, it is submitted, the reasonableness of a legislation affecting fundamental rights can undoubtedly be examined by the Supreme Court.[81] Thus under section 15 of the Constitution there is a prohibition against the enactment of discriminatory law. However, there is an exception which provides that a discriminatory law is permissible where the nature of the discrimination and the special circumstances surrounding it are such that it is "reasonably justifiable in a democratic society".[82] It is submitted that whether legislation is reasonably justifiable in a democratic society will ultimately be a question for judicial determination and assessment. In other words, whether the legislation which falls under section 15 (3) (e) strikes a proper balance as being reasonably justifiable or not

---

78 Constitution, ss. 19 and 25 (b). But cf. s. 25 (e).

79 Ibid., s. 15.

80 E.g., Ibid., ss. 37, 70, 91, 120 and 129 dealing respectively with membership in the House of Representatives, prorogation and dissolution of Parliament, tenure of office of judges; withdrawals from Consolidation Funds or other public funds and appointment to certain offices.

81 The subject of fundamental rights is treated in greater detail elsewhere; see pp. 427 et seq., post.

82 S. 15 (3) (e). For a further treatment of this phrase see pp. ? et seq., post.

in a democratic society is for the Court to determine. If it shall appear to the Court that the law fails to strike a proper balance, it can declare the law to be void.[83]

It can therefore be said that under the Fiji Constitution legislative sovereignty is limited at least with respect to the fundamental rights of a citizen. First, the provisions curtail the legislative choice as to the law's ends and means. Secondly, they subject the decision of the legislature to judicial review.

(3) "Peace, Order and Good Government of Fiji"

This phrase "peace, order and good government" has been a conspicuous feature in Imperial statutes conferring legislative powers on colonial legislatures and later on a few Dominion legislatures.[84] Although this phrase has been judicially considered in various cases by both the Privy Council and Colonial and Commonwealth courts, its component parts have never been fully analysed to determine their full implications and meaning. Nonetheless it has been held that the words "peace, order and good government" connote, in British constitutional language, the widest law-making powers appropriate to a sovereign legislature.[85]

It is submitted, however, that the Fiji Constitution requires as a criterion of validity that legislation must not only be for peace, order and good government but it must in addition be so in relation to Fiji. The enactment must be pointed to or aimed at being not only for the "peace, order and good government" but also "of Fiji". In other

---

83 As in Akar v Attorney-General for Sierra Leone [1970] A.C. 853.

84 E.g., New Zealand.

85 Ibralebbe v The Queen [1914] A.C. 900, 923.

words it is against the background of Fiji that one must assess whether legislation is for peace order and good government. It is only when legislation comes within the ambit of this phrase that the Parliament of Fiji has plenary powers and ultimate discretion of enactment.[86]

If the legislation is within the general scope of the affirmative words which bestow the legislative powers, and provided it does not violate other provisions of the Constitution, the courts must inquire no further. In R. v Burah[87] the Privy Council declared:

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the term of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted.

This is not to say, however, that the courts can investigate the intentions or policy of legislation to enquire whether it would secure peace, order or good government. It is submitted with respect, that Halsbury, L.C. was correct when he made the following observation:[88]

> [I]t appears to be suggested ... that if a Court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order and good government, that they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as ultra vires and beyond the competency of the Dominion Parliament to enact.
>
> Their Lordships are of opinion that there is not the least colour for such a contention.

This does not alter the submission that to be valid legislation in Fiji must have as its aim "the peace, order and good government of Fiji".

---

86 R v Burah (1878) 3 A.C. 889; Riel v The Queen (1884) 10 A.C. 675.

87 R v Burah (1878) 3 A.C. 889, 904.

88 Riel v The Queen (1884) 10 A.C. 675, 678.

Such a question was directly raised by Evatt, J. in Trustees, Executors and Agency Coy v Federal Commissioner of Taxation.[89] His Honour specifically posed the question and answered it in relation to the New Zealand Parliament. However, it is just as relevant to the position of the Fiji Parliament inasmuch as section 53 of the New Zealand Constitution Act 1852 (as it stood until November 1973) was mutatis mutandis the same as section 52 of the Fiji Constitution. It dealt with "peace, order and good government of New Zealand". His Honour said:[90]

> Could the Dominion of New Zealand, apart from section 3 of the Statute of Westminster, make punishable within its borders an assault committed upon French soil by a Frenchman upon a Frenchman?
>
> ... [I]t would, in my opinion, be beyond power. But this is not because non-Dominion matters are dealt with by the law. The true reason for concluding that such a law is ultra vires the Dominion, is to be found in answering the relevant question: Can it be regarded as a law for the peace, order, and good government of New Zealand? In truth the conduct aimed at would bear no relation to New Zealand, and the law could forward its welfare in no conceivable way. In a proper case, which must necessarily be a very rare case, the Courts of the Dominion would be bound to pronounce a law invalid upon this ground, which is firmly founded upon the very words used in the New Zealand Constitution.

Although his Honour said "apart from section 3 of the Statute of Westminster", it will be seen that this phrase has no bearing on the generality of what was said.

His Honour proceeded to deal with the position of a Dominion Parliament, like that of the Commonwealth of Australia, where the authority to legislate for peace, order and good government related

---

89 (1933) 49 C.L.R. 220.

90 Ibid., 235.

to the subject matters enumerated therein, but added:[91]

> In the case of the New Zealand Parliament, however, this additional complication does not arise, because, so long as the peace, order and good government of New Zealand are in some way bound up with the law possessing non-New Zealand elements, the precise ground of concern need not be described, classified, or even stated. For such Parliament has a general jurisdiction over peace, order and good government, and there is no other competing Legislature within that Dominion.

Later his Honour stated:[92]

> (1) The mere exhibition of non-territorial elements in any challenged legislation does not invalidate the law. (2) The presence of such non-territorial elements may however call attention to the necessity for enquiring whether the challenged law is truly a law with respect to the 'peace, order and good government' of the Dominion - the words employed in the constitutional statute to define and limit the legislative power. (3) It is the duty of the Courts of the Dominion to make this enquiry in a proper case. (4) The test is not quite, as Sir John Salmond suggested, whether the law is a 'bona fide 'exercise of the subordinate legislative power' (Law Quarterly Review, Vol. 33, 122) because the bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts. (5) The test is whether the law in question does not, in some aspects and relation, bear upon the peace, order and good government of the Dominion, either generally or in respect to specific subjects. (6) If it does not bear any relation whatever to the Dominion, the Courts must say so and declare the law void. If it bears any real or substantial relation, then it is a law for the peace, order and good government of the Dominion.

It is to be noted that before setting out those propositions, Evatt, J. was discussing[93] "those Dominions where section 3 of the Statute of Westminster has not been applied 'as part of the law' ". But it is submitted that what was said by his Honour was of general application

---

91 Ibid., 237.

92 Ibid., 240.

93 Idem. The question of extra-territorial legislation and its relation to s. 3 of the Statute of Westminster is relevant here. However, such a question has been more conveniently dealt with in Appendix I. see p.717, post.

and that section 3 of the Statute of Westminster [94] in no way affects the position in view of the fact that even before the enactment of the Statute of Westminster every Dominion legislature had power [95] to make laws having extra-territorial operation. [96] The "qualifying" remarks of Evatt, J. may be ignored; they in no way diminish the correctness of his observations as to the power of the Dominion Court to pronounce legislation ultra vires as not being for peace, order and good government. [97]

This question whether a New Zealand statute can be declared ultra vires as falling outside the ambit of the legislative competence of the New Zealand Parliament was squarely before the Supreme Court of New Zealand in R. v Fineberg. [98] In that case Fineberg was indicted before the Supreme Court of New Zealand with an offence under section 8 of the Crimes Act 1961. The substance of the charge was that on or about 19 June 1967, on board a Commonwealth ship on high seas, Fineberg attempted to murder another person. It was contended for the accused that section 8 of the Crimes Act was ultra vires the New Zealand Parliament because all laws made by the New Zealand Parliament must be directed to promoting

---

94 S. 3 of the Statute of Westminster 1931 provides:

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Cf. s. 3 of schedule 1 of the Fiji Independence Act 1970 (U.K.) which provides:

> The legislature of Fiji shall have full power to make laws having extra-territorial operation.

95 As to whether they were limited or not see Appendix I, post, where the question of extra-territorial legislation and its relation to s. 3 of the Statute of Westminster is discussed.

96 Croft v Dunphy [1933] A.C. 156.

97 See Appendix I, post.

98 [1968] N.Z.L.R. 119.

"the peace, order and good government of New Zealand".[99] Section 8 of the Crimes Act 1961 was concerned with acts and omissions beyond New Zealand on board ships or aircraft. It provided that where any such act or omission would, if occurring in New Zealand, be a crime under New Zealand law, the person involved would be treated as if the act or omission had occurred in New Zealand and would be liable to the penalties laid down by New Zealand law. It was urged on behalf of the accused that this section did not promote the peace, order and good government of New Zealand and was therefore ultra vires.

The Crown's submission, inter alia, was that once the New Zealand Parliament had adopted section 3 of the Statute of Westminster, it became unnecessary that its laws (at least, those having extra-territorial operation) should meet the requirement of being for the peace, order and good government of New Zealand. Thus, it was submitted, that since section 8 of the Crimes Act 1961 operated extra-territorially it came within section 3 of the Statute of Westminster.[1]

---

99 The source of the legislative power of the New Zealand Parliament in 1961 and 1967 was s. 53 of the New Zealand Constitution Act 1852 which provided:

> It shall be competent to the said General Assembly (except and subject as hereafter mentioned) to make laws for the peace, order and good government of New Zealand, ...

However, because of the doubts thrown on the strength and scope of this section the New Zealand Parliament by the New Zealand Constitution Amendment Act 1973, repealed s. 53 and replaced it by a new provision reading:

> 53 (1) The General Assembly shall have full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.
>
> (2) Without limiting the validity of any Act of the General Assembly passed before the 25th day of November 1947 (being the date of the passing of the Statute of Westminster Adoption Act 1947), every Act of the General Assembly duly passed on or after that date, and every provision of every such Act, are hereby declared to be and always to have been valid and within the powers of the General Assembly.

1 See n. 94 p. 218, ante.

The Court rejected the contention and held, relying on The British Columbia Electric Railway Company Limited v The King[2] that the effect of section 3 of the Statute of Westminster on section 53 of the New Zealand Constitution Act 1852 was to make the latter section read:[3]

> It shall be competent to the said General Assembly ... to make laws for the peace, order and good government of New Zealand, even though such laws have an extra-territorial operation.

A second contention on behalf of the Crown was that in any event section 8 of the Crimes Act 1961 was a law for the peace, order and good government of New Zealand. It was argued that this would be so if any purpose it achieved came within that description. This was opposed by the defence with the argument that if the court could point to one possible application of that section which did not involve the peace, order and good government of New Zealand, there arose a duty to hold the section ultra vires. The court, in rejecting the argument of the defence, held that although section 8 contained elements of extra-territorial operation, it nevertheless came 'within the general scope' of, and in some aspects and relations had bearing upon, the peace, order and good government of New Zealand. Hence it was held that the section was not ultra vires.

The legislative powers of the Fiji Parliament are essentially the same as those of the New Zealand General Assembly prior to 1973. Section 52 of the Fiji Constitution states that Parliament "may make laws for the peace, order and good government of Fiji". In addition, there is a specific provision[4] which states: "The legislature of Fiji shall have full power to make laws having extra-territorial operation". This, as will be noticed, is basically the same provision

---

2 [1946] A.C. 527.

3 [1968] N.Z.L.R. 119, 123.

4 S. 3 of schedule 1 of the Fiji Independence Act 1970.

as section 3 of the Statute of Westminster.

The provisions of the Statute of Westminster were designed, it is submitted, to remove the generally accepted limitation and to resolve doubts as to the scope of the competence of Dominion legislatures to legislate extra-territorially. After the passage of the Statute of Westminster, any such legislative incompetence was extinguished. Henceforth, the Dominions were at liberty, without any fear of invalidity, to enact laws having extra-territorial operation.[5] Thus in British Columbia Electric Railway Co. Ltd. v The King[6] Viscount Simon, in delivering the judgement of the Privy Council, quoted with approval what was said by Rand, J. and Kellock, J. in the Supreme Court of Canada, namely:

> The specific investment of extra-territorial power by s. 3 of the statute of 1931 was designed no doubt to remove the generally accepted limitation of colonial legislative jurisdiction, ... and any such jurisdictional inadequacy no longer hampers the legislative freedom of the Dominion.

The Judicial Committee held that the effect of section 3 of the Statute of Westminster was to add to the legislative powers of the Canadian legislatures the words "even though such laws have an extra-territorial operation". This was also the view adopted in R v Fineberg.[7] The position is the same in Fiji. Section 3 of schedule 1 to the Fiji Independence Act 1970 is parallel to section 3 of the Statute of Westminster. Accordingly, there are no legal limitations whatsoever on the Fiji Parliament to enact legislation having extra-territorial operation, provided of course it falls within section 52 of the Constitution. Whatever may have been the position

---

5 See Appendix I, p.717, post.

6 [1946] A.C. 527, 542.

7 [1968] N.Z.L.R. 119.

earlier, any limitations have been done away with by the enactment of the Fiji Independence Act. It is submitted that the effect of section 3 of schedule 1 is to make section 52 of the Constitution read:[8]

> Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Fiji, even though such laws have an extra-territorial operation.

Thus the Independence Act removed any supposed incapacity of the Parliament of Fiji to pass legislation having extra-territorial effect, but, it is submitted, it did not overcome the limitation inherent in the phrase "peace, order and good government of Fiji".

It has been submitted that the power of the Fiji Parliament to make laws is confined to "peace, order and good government of Fiji". It is true that the courts have paid little attention to the actual words of the phrase. Instead the courts have concerned themselves with the general doctrine of legislative competence. Nevertheless, as has been seen, New Zealand and Australian courts have expressly accepted that limitations are imposed by this hallowed phrase.[9] The Privy Council has interpreted the phrase as authorising[10]

> the utmost discretion of enactment <u>for the attainment of the objects pointed to.</u>

The Judicial Committee emphasised how wide the powers are in <u>Croft</u> v <u>Dunphy</u>.[11]

> Once it is found that a particular topic of legislation is

---

8 Adopting the decision in <u>British Columbia Electric Railway Co.</u> v <u>The King</u>, supra, and <u>R</u> v <u>Fineberg</u>, supra.

9 <u>R</u> v <u>Fineberg</u>, supra, and <u>Trustees Executors</u> case, supra.

10 <u>Riel</u> v <u>The Queen</u> (1884) 10 A.C. 675, 678 (Emphasis added). See also <u>Chenard and Co.</u> v <u>Joachim Arissol</u> [1949] A.C. 127, 132.

11 [1933] A.C. 156, 163.

> among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada ... their Lordships see no reason to restrict the permitted scope and such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

It is a prerequisite that the legislation must have some relation to "peace, order and good government" of the country concerned.

Two possible opposing views may be taken in determining the validity of legislation of the Fiji Parliament. One view is that if the legislation in some way or other comes within the ambit of "peace order and good government of Fiji", it will be valid. The diametrically opposite view is that if even one possible application of it which did not involve the peace, order and good government of Fiji could be shown, there would arise a duty on the courts to hold the legislation concerned ultra vires. It has been seen that in no case would a court enter into the inquiry whether as a matter of fact or policy the legislations would secure peace, order and good government of Fiji.[12] Accordingly, it is submitted that in determining what the subject-matter or purpose or object of the legislation is, the sole question to be considered is the legal effect of the law. This it is submitted, would solve the major question.

This leads us to the further inquiry as to whether a law can be questioned on the ground of whether its legal effect attains the constitutional requirement. If the inquiry reveals that the legal effect would not have bearing in any conceivable way on Fiji or on the advancement of its peace, order and good government, the legislation ought to be held ultra vires. If, on the other hand, the law is found to involve Fiji's peace, order and good government, then despite the provisions containing non-Fiji elements, that law should be held to be intra vires.[13]

---

12 P.216, ante.

13 Trustees Executors case, supra, and R v Fineberg, supra.

The legislatures of Fiji and New Zealand are in the same position in this respect. The phrase "peace, order and good government" by itself is very broad. It would be proper to concede that the phrase confers on the legislature concerned the widest law-making powers appropriate to any "sovereign legislature".[14] However, it is submitted, the addition of the words "of Fiji", or "of New Zealand" qualifies the earlier part of the phrase. As Dr A.M. Finlay, the Minister of Justice in New Zealand, referring to the New Zealand provision, said, "the sting is in the fourt part, the words 'of New Zealand'".[15]

Professor J.F. Northey has expressed doubts in regard to the New Zealand provision and its full implications in relation to the legislative competence of the New Zealand General Assembly.[16] The learned Professorobserved:[17]

> Most New Zealand lawyers would be prepared to acknowledge without much, if any, hesitation that the 1947 legislation removed all remaining limitations on the legislative competence of the General Assembly. But it is not altogether free from doubt. Section 53 enables the General Assembly to legislate for the 'peace, order and good government of New Zealand' ... but must all legislation relate to New Zealand's peace, order and good government to be valid? .... If the legislation had no connection with peace, order and good government, s. 3 of the Statute of Westminster would not necessarily save it from invalidity .... Though ... the New Zealand Constitution Act (is) to have that construction most beneficial to the 'widest amplitude of power' it is implicit in such statements that the powers in question may be too narrow to support some legislation.

These doubts were expressed by the learned author in 1965 and they foreshadowed the decision in R v Fineberg.[18]

---

14 Ibralebbe v The Queen [1914] A.C. 900, 923.

15 New Zealand Parliamentary Debates (Hansard) 1973, at 5235.

16 The powers and competence of which were similar to the present position in Fiji; see n. 99 p.220, ante.

17 J.F. Northey, "The New Zealand Constitution" in A.G. Davis Essays in Law (1965), 149, 159. (Emphasis added).

18 Supra.

Those doubts, reinforced by that decision, led to the enactment of the New Zealand Constitution Amendment Act 1973. It is interesting to note what Dr. Finlay, the Minister of Justice, had to say in relation to the Bill. He stated:[19]

> (T)his Bill is concerned with such fundamental matters as the legislative powers of Parliament and the right of the courts to declare an Act of Parliament void and inoperative .... It is important legally in that it removes a fetter on our powers to make laws .... We are thus our own masters. In the meantime, however, until we do alter the New Zealand Constitution Act the powers of the New Zealand Parliament are defined and limited by section 53 of the New Zealand Constitution Act, which provides that Parliament may make laws 'for the peace, order and good government of New Zealand'....
>
> No court has ever suggested that it might strike down an Act of the New Zealand Parliament on the ground that the Act did not promote peace, order or good government. Those are three of the four constituent parts. The sting is in the fourth part, the words 'of New Zealand'. To be valid, it seems that any legislation must be regarded by the courts as sufficiently related to New Zealand to be for our peace, order and good government. The Statute of Westminster removed the supposed incapacity of Parliament to pass legislation having extra-territorial effect, but it did not get over this particular difficulty springing from the words of our English constitutional Act. The result is that the status of quite a number of Acts passed by the Parliament ... is uncertain.

It seems that Dr. Finlay also accepted the limitations of the New Zealand General Assembly in relation to matters not falling within the peace, order and good government of NewZealand. Accordingly in 1973 the New Zealand Parliament amended Section 53 by repealing it and enacting in its stand the provision that:

> The General Assembly shall have the full power to make laws having effect in, or in respect of, New Zealand or any part thereof and laws having effect outside New Zealand.[20]

---

19 New Zealand Parliamentary Debates (Hansard) 1973 at 5235.

20 For the complete text, see n. 99, p.220 , ante.

In so doing, the New Zealand Parliament removed all doubts pertaining to any restriction that the phrase "peace, order and good government of New Zealand", may have had.

It can be asserted with confidence that as far as the subordinate legislatures were concerned the phrase "peace, order and good government" had a definite meaning. The validity of legislation was judged by reference to this phrase in many cases. As Sir Kenneth Roberts-Wray succintly put it:[21]

> It is now well established, particularly by the long line of cases ... on the vires of laws having extra-territorial operation, that the decisive and only test of validity of any law of a subordinate legislature is whether it is within the legislative powers granted. As a rule that poses the question whether the law can be regarded as one 'for the peace, order and good government of' 'the country concerned.

It is submitted that this has as much application to an independent country like Fiji as to a subordinate legislature. After all the phrase in question, either for a subordinate legislature or a "sovereign" legislature, has been widely used in the context of legislative competence. The rules of statutory interpretation support this view. Thus the same words or phrase, when used in Acts dealing with the same subject-matter, are taken to have the same meaning.[22] Furthermore an interpretation placed upon earlier legislation similar in scope is likely to be adopted when interpreting later statutes.[23] In addition, where a provision in an Act of Parliament which has received judicial inter-

---

21 K. Roberts-Wray, Commonwealth and Colonial Law (1966), 369.

22 E.R. Ives Investments Ltd v High [1967] 2 Q.B. 379; Registrar of Restrictive Trading Agreements v W.H. Smith and Son Ltd. [1968] 1 W.L.R. 1541; see also Maxwell, Interpretation of Statutes (12th ed., 1969), 64 & seq., see further J.M. Knowles Ltd v Rand [1962] 1 W.L.R. 893, 896; Bracey v Read [1963] Ch. 88, 96; Fisher v Raven [1964] A.C. 210, 228.

23 Maxwell, op. cit., 71. See also Greaver v Tofield (1880) 14 Ch. D. 563, 571.

pretation is re-enacted in the same terms, the legislature is deemed to have adopted that interpretation[24] and the new legislation generally will be interpreted in the light of the earlier decision.[25]

In Fiji, the legislative powers were initially granted to the Colony on 2 January 1875 by Charter, clause iv of which defined the legislative competence as being "for the peace, order and good government of the Colony of Fiji". Subsequently, the various Letters Patent,[26] the Constitution Orders in Council[27] and finally the Independence Order in Council of 1970 all retained the same phrase. Accordingly, it is submitted that under the rules of statutory interpretation the phrase "peace, order and good government of Fiji" in section 52 of the Constitution must be given the same meaning as it has been in the cases already discussed. This is particularly so in regard to the Privy Council decisions because that body continues to be the highest judicial authority in Fiji.

It is worthy of note that some of the countries which became independent after 1933 (that is after the decision in Croft v Dunphy)[28] have abandoned the formula of "peace, order and good government". For instance, in India the legislative power is "to make laws".[29] Similarly Article 43 of the Constitution of Western Samoa states that:

> Parliament may make laws for the whole or any part of Western Samoa and laws having effect outside as well as within Western Samoa.

---

24 Exparte Campbell, Re Cathcart (1870) L.R. 5 Ch. App. 703; Webb v Outrim [1907] A.C. 81.

25 Maxwell, op. cit., 73.

26 Those of 1880, 1904, 1914, 1916, 1929, and 1937.

27 Those of 1963 and 1966.

28 [1933] A.C. 156.

29 Art. 245 (1) of the Constitution of India.

New Zealand, as we have seen has also followed suit. It is submitted that at the very least there are doubts as to the legal implications of the phrase, "peace, order and good government of Fiji". This appears not only from the decisions and pronouncements of various courts but also from the actual practice of some countries[30] which have dropped the phrase completely and have adopted more definite, comprehensive and all-embracing terms. It is submitted that the Fiji Parliament ought also to take a similar step. The doubts surrounding the full implications of the phrase are sufficient reason for an amendment. Otherwise there is a risk illustrated by R. v Fineberg,[31] that there will be a challenge to the competence of the Fiji Parliament in relation to legislation which appears to have little or any bearing on the government of Fiji.

E. Conclusion

From the foregoing, it would appear that the Parliament of Fiji does not satisfy the two tests of sovereignty formulated by Dicey, and it cannot accordingly claim to be sovereign in the sense described by him. The Fiji Parliament is not a sovereign body in the sense of being uncontrolled with unlimited powers. The sovereignty which can be claimed by the United Kingdom Parliament cannot be claimed by the Fiji Parliament. The Fiji Constitution has not adopted the doctrine of parliamentary supremacy but, as has been seen, constitutional supremacy. The legislature in Fiji is bound to follow the provisions of the Constitution and each action and exercise

---

30 E.g. India, Western Samoa, New Zealand and Tanzania, Tanzania like New Zealand, had such a phrase initially in its Constitution Act; but later amended the same by dropping the phrase in subsequent Constitution Acts.

31 Supra.

of power is tested against its provisions. In this sense the Constitution is hierarchically superior to rules of law enacted by the legislature except in so far as those rules have been made in accordance with the provisions of the Constitution. Thus to the extent that the Fiji Constitution imposes limitations upon the powers of the legislature, limitations which can not be altered or repealed except in the manner specified, the Constitution is supreme.

It is the function of the Courts to apply the principle of constitutional supremacy in Fiji because it is their function to determine the constitutionality of laws passed under the Constitution. The Constitution has conferred jurisdiction on the Supreme Court to decide these questions. The Courts are bound to treat the Constitution as the fundamental law and all questions of validity or invalidity of laws are to be tested against the provisions of the Constitution.

Accordingly, it is submitted, legal supremacy in Fiji ultimately resides in the Constitution. The Constitution certainly does not establish parliamentary supremacy as understood in English jurisprudence. It seeks to balance the claims of a pluralistic society. It has a Bill of Rights as a check on the illegitimate exercise of governmental and legislative powers, and it also has corresponding provisions for their enforcement.

The requirements of the entrenched provisions of the Constitution and the composition of the House of Representatives are such that no one racial group can be predominant in the multiracial society existing in Fiji. The entrenched provisions require either a two thirds or a three quarters majority for enacting certain laws; and no one racial group on its own can satisfy the requirements of the stipulated majorities.[32] Thus the Constitution in Fiji attempts to establish and

32 There are 52 members in the House of Representatives, of which 22 are Fijians, 22 Indians and 8 who are neither Indian nor Fijian; (see p.113, ante). Hence no one racial group alone could comprise two-thirds or three quarters of all the members.

maintain an equilibrium not only between the state on the one hand and the individual on the other, but also amongst the ethnic groups of a pluralistic society. In such a constitution there is obviously very little place for legislative supremacy in the English sense. Thus in Fiji if there is an irreconcilable conflict between an Act of Parliament and a provision of the Constitution, the Constitution must prevail.

However, before the decision on constitutionality can be taken a preliminary issue must be resolved - is there an Act of Parliament? It is necessary therefore to decide whether what purports to be an Act of Parliament is truly the authentic expression of the will of the legislature.

CHAPTER VII

THE AUTHENTIC EXPRESSION OF THE WILL OF THE LEGISLATURE

A. Introduction

Notwithstanding the finding that in Fiji the issue of whether the Courts have the competence to determine the validity of Acts of Parliament on constitutional grounds appears to admit of a clear answer in the affirmative, there are other possible difficulties standing in the way of judicial review. These arise from technical common law rules, which if applied in Fiji with its "controlled" Constitution, may well have an unfortunate effect.

The question posing the greatest problem is the old chestnut concerning the competence of the courts to investigate what ex facie appears to be an Act of Parliament. In other words, are the courts entitled to enquire whether the "Act" is an authentic expression of the will of the Legislature?

In the United Kingdom the Courts do not recognise any judicial or other authority as having the right to treat an Act of Parliament as void or unconstitutional. The time is past when one might argue that an Act of the United Kingdom Parliament is void as being contrary to immutable principles of natural or common law.[1] At present, under the British Constitution, legislation of the United Kingdom Parliament can never be challenged as an excess of power.[2]

However, it is submitted, that there is a distinction to be drawn between an inquiry as to whether an Act of Parliament is ultra vires on the one hand, and an inquiry as to whether a document, purported to be an Act of Parliament, is in fact an authentic expression of the will of Parliament.

---

1 D.V. Cowen, "Legislature and Judiciary" (1953) 16 M.L.R. 273, 274.

2 This must, however, be seen subject to the obligations of the

(1) Conclusiveness of Parliamentary Roll

In the United Kingdom the chief original source for Acts of Parliament were the Statute Rolls, consisting of enrolments in chancery and proceedings in Parliament. This was the position until 1849. Since 1849 there has been no "Roll" as such. Instead

---

2 cont.

United Kingdom under the European Convention on Human Rights and the European Economic Community. For instance under the European Convention the Acts of the United Kingdom Parliament are now subjected to review by the European Commission of Human Rights according to a set of international norms. Thus the United Kingdom itself is liable to "afford just satisfaction to the injured Party" (Articles 28 - 32 and 50 of the Convention) if a "breach" of the European Convention is found; see D.R. Gilmour, "The Sovereignty of Parliament and the European Commission of Human Rights" (1968) Public Law. 62 63.

It is not intended to examine the position of the United Kingdom Parliament and the Courts in relation to the European Convention and the E.E.C., but see D. Thompson and N.S. Marsh, "The United Kingdom and the Treaty of Rome" (1962) II I.C. L.Q. 77; Cmnd. 3301 (1967), Legal and Constitutional Implications of United Kingdom Membership of the European Communities; J.D.B. Mitchell, " 'What Do You Want To Be Inscrutable For, Marcia?' or The White Paper on the Legal and Constitutional Implications of United Kingdom Membership of the European Communities" (1967 - 1968) 5 C.M.L. Rev. 112 esp. 116 - 125; U. Kitzinger, "The Realities of Sovereignty" in Britain and the Common Market (1967) 67 - 75; N.M. Hunnings, "Constitutional Implications of Joining the Common Market," (1968 - 1969) C.M.L. Rev. 60; Alan Campbell, Common Market Law (1969) esp. vol. 1, 56 - 57; J.D.B. Mitchell, "British Law and British Membership" (1971) 6 Europarecht 97; J.D.B. Mitchell, "Constitutional Aspects of the Treaty and Legislation Relating to British Membership" (1972) 9 C.M.L. Rev. 134 esp. 141 - 150; F.M. Auburn, "Trends in Comparative Constitutional Law" (1972) M.L.R. 129 esp. 133 - 139; J. Forman, "The European Communities Act 1972, The Government's Position on the Meaning and Effect of its Constitutional Provisions" (1973) 10 C.M.L. Rev. 39.

since 1849, the Queen's Printer makes two vellum prints authenticated by the Clerk of the Parliament, one of which is kept in the House of Lords and the other deposited in the Public Record Office. These are regarded as the definitive official copies. The significant question arises as to the conclusiveness of the enactment so "enrolled".

The general rule is that the Parliamentary Roll or vellum is conclusive. Thus in Edinburgh & Dalkeith Railway Co. v Wauchope,[3] Lord Campbell stated:

> All that a Court of Justice can do is to look to the Parliamentary roll; if from that it should appear that a bill has passed both Houses, and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.

This was a case where Wauchope claimed certain wayleaves and the matter was dealt with in a private Act of Parliament. He maintained that the provisions of that Act should not be applied because it had been passed without his having had notice as required by the Standing Orders. The Court rejected that contention.

Under this general rule the court would not allow a plea to the effect that an Act was obtained by fraud.[4] In the United Kingdom a court of law would not go behind what has been enacted by the legislature to consider whether the appropriate procedure of Parliament had been followed, or whether it arose out of incorrect information,

---

3 (1842) 8 Cl. & F. 710, 723.

4 Waterford Railway Co. v Logan (1850) 14 Q. B. 672.

or indeed, out of fraud or actual deception of someone on whom the Parliament placed reliance. Even in those circumstances the court would accept the enactment as the law.[5] If there are any such circumstances present, it is not for the courts to take cognisance of these facts and declare the Act invalid; it is solely within the jurisdiction of the legislature to rectify the position. This view of the conclusiveness of an Act of Parliament has been so strong in the United Kingdom that there have been occasions on record when Bills containing amendments made by one House have accidentally received the Royal Assent before the amendments were agreed to by the other House. Parliament, under such circumstances, found it necessary to pass validating legislation to correct the "error".[6]

This principle of the conclusiveness of the Act as recorded has recently been reaffirmed and applied by the House of Lords in British Railways Board v Pickin.[7] In this case the plaintiff alleged, inter alia, that the passage of a private Act of Parliament had been fraudulently obtained by the Board and thus the rights secured under the Act by the Board were ineffective to deprive

---

5 Hoani Te Heuheu Tukino v Aotea District Maori Land Board [1941] A.C. 308, 322; see also Earl of Shrewsbury v Scott (1859) 6 C.B.N.S. 1, 160; Lee v Bude and Torrington Junction Railway Co. (1871) L.R. 6 C.P. 576, 582; Labrador Co. v The King [1893] A.C. 104, 123.

6 Cowen, loc. cit., 275 and the example cited by the learned writer, i.e. 6 & 7 Vict. C. xxxvi (1843); 1 & 2 Geo. 4 C. xcv; and 7 Vict. C. xix. See further for discussion W.F. Craies, Statute Law (7th ed., 1971), 514 et seq.

7 [1974] A.C. 765.

the plaintiff of his land or proprietary rights. The House of Lords held that the courts had no power to disregard an Act of Parliament, whether public or private, nor had the courts power to examine proceedings in Parliament in order to determine whether the passing of an Act had been obtained by means of an irregularity or fraud. Lord Reid observed:[8]

> The idea that a court is entitled to disregard a provision in an Act of Parliament on any ground must seem strange and startling to anyone with any knowledge of the history and law of our constitution ....

His Lordship continued:[9]

> The function of the court is to construe and apply the enactments of Parliament. The court has no concern with the manner in which Parliament or its officers carrying out its Standing Orders perform these functions. Any attempt to prove that they were misled by fraud or otherwise would necessarily involve an enquiry into the manner in which they had performed their functions in dealing with the Bill ....

Lord Morris of Borth-Y-Gest added:[10]

> The question of fundamental importance which arises is whether the court should entertain the proposition that an Act of Parliament can be so assailed in the courts that matters should proceed as though the Act or some part of it had never been passed. I consider that such doctrine would be dangerous and impermissible. It is the function of the courts to administer the laws which Parliament has enacted .... When an enactment is passed there is finality .... In the courts there may be argument as to the correct interpretation

---

8 Ibid., 782.

9 Ibid., 787.

10 Ibid., 788.

of the enactment: there must be none as to whether it should be on the Statute Book at all.

However, in the United Kingdom, although they have declined to entertain enquiries concerning the internal procedure of Parliament, the courts have inquired whether purported legislation as enrolled is an Act of Parliament. The presence of any document vouched for as a Statute on the Parliamentary Roll, Statute Roll or on Vellum, or its absence therefrom, is not absolutely conclusive for or against its legislative validity. The courts have to some extent power to enquire whether a statute is what it purports to be, viz. an Act of Parliament,[11] and are entitlted to look at what the "enrolled" copy itself says to see whether any fundamental defect appears therefrom. If there is a defect, the court is then entitled to declare the legislation invalid inasmuch as it would then not be an authentic expression of the will of the legislature. Thus in the United Kingdom for there to be valid legislation it is essential that the House of Lords, the House of Commons and Her Majesty consent to it.[12] If one element does not so consent and the defect appears on the "enrolled Act", the court would declare it invalid. Such a question arose in Pylkington's case[13] in which, by a special "Act of Parliament" passed in 1450, Sir John Pylkington was required to appear on a charge of rape. He refused to do so and challenged the validity of the "Act." It was pointed out by the accused that the Bill, as it passed the Commons, required him to surrender himself "before the feast of Pentecost next ensuing". This was interpreted by the court

---

11 Craies, op. cit., 37.

12 Except of course in case of certain exceptions falling within the Parliament Act 1911 and 1949.

13 (1450) Y. B. 33 Hen. 6.

to mean Pentecost 1450. Whereas as it passed the Lords, he was to appear "before the feast of Pentecost which shall be in 1451." On these grounds it was argued that as on the face of the Bill there were two different dates, the "Act" had not, in the most important particular, been agreed to by both Houses and therefore was not a valid Act. The majority of the court held that it was invalid. It is submitted that it was so held because the defect appeared in the body of the Parliamentary roll.

This case may be compared with The King v The Countess of Arundel[14] where a Bill which originated in the Upper House was sent down to the Lower House. It was returned with a proviso endorsed on the body of the Bill. There was, however, no such proviso extant upon the record. Royal assent had been given. The Act was challenged on the ground that the Commons had not assented to the Act as it stood without the proviso, and, therefore, it was not an Act of both Houses, as it ought to be. It was held, inter alia, that it was a valid enactment as on the face of the record there was a complete Act without the proviso. The proviso had nothing to do with the validity of the Act. The court said that to determine whether it was an Act, the court must look at the Act itself. It is only from the Act and the record of it that the invalidating ground can come[15] and nothing extrinsic, not even the Parliamentary Journal, can be called in aid.[16]

It was however, accepted that if from the Act itself defects were apparent, the court would be put on inquiry, and if needs be, could treat it as no Act of Parliament at all. Thus the Court observed:[17]

But if the record of the Act itself carry its deaths wound

---

14 (1616) Hobart 109.

15 Ibid., 110.

16 Ibid., 111.

17 Idem.

> in itself, then it is true that the parchment, no nor the Great Seal, either to the original Act, or to the exemplification of it will not serve ....

Reliance is generally placed on the words of Lord Campbell in Edinburgh and Dalkeith Railway v Wauchope[18] that the Parliamentary roll is conclusive and that no court will look behind it. His Lordship's pronouncement that the courts will make no further inquiry is based on the basic premise that "from [the Parliamentary roll] it should appear a bill has passed both Houses, and received the Royal assent." As a corollary, it follows that if these requirements are not satisfied the courts would be entitled to question the authenticity of the purported Act. It may, therefore, be asserted that the court is entitled to go by what the enrolled copy itself says to see whether the essential attributes of valid legislation are present. Accordingly, if on examining the enrolled Act, the defect or error appears upon the record, the court is entitled to hold that what purports to be an "Act of Parliament" is not in law such an Act.[19] Similarly, if the enacting clause in the Act and/or the certificate of the presiding officers shows how an Act has been passed, and an irregularity is disclosed the court would be entitled to act on such evidence as the "Act" would itself carry its "deaths wound". This was the case in Harris v Donges[20] where the enacting clause and the original of the Act, signed by the Governor-General and filed with the Registrar of the Court, showed clearly that it was enacted by the respective Houses sitting separately whereas it

---

18 (1842) 8 Cl. & F. 710, 723.

19 B. Beinart, "Parliament and the Courts" [1954] S.A.L.R. 134, 167. See also Field v Clark (1891) 143 U.S. 649, 672 where the court said:

> It is admitted that an enrolled Act thus authenticated, is sufficient evidence of itself - nothing to the contrary appearing upon its face - that it passed Congress. (Emphasis added).

See further Gallant v The King [1949] 2 D.L.R. 425.

20 [1952] T.L.R. 1245.

should have been passed by both the Houses sitting together.

In Bribery Commissioner v Ranasinghe [21] the certificate of the speaker required by the constitution was missing from the Act as enrolled. It was held that the certificate of the Speaker was a necessary part of the legislative process and any Bill which did not comply with this condition was invalid even though it had received the Royal Assent. Here too the omission was apparent from the Act as enrolled.

This analysis of the three cases shows that a court need not accept every Act of Parliament so enrolled as valid and that the Parliamentary roll or other "enrolment" of Acts is not conclusive for all purposes. The court is entitled to examine the rolls and should defects appear on their face, it can accept the defects as sufficient proof of the invalidity of the "legislation" and declare it not an Act of Parliament.

(2) Evidence Aliunde

The next important question concerns the extent to which the courts may make further enquiries beyond the enrolled Act. This necessarily involves the question as to how far, if at all, the courts may admit evidence aliunde to determine the authenticity of an Act of Parliament. In other words, to what extent is extrinsic evidence admissible to prove the invalidity of an Act of Parliament which is ex facie authentic?

Prima facie, the dictum of Lord Campbell[22] seems to indicate that the court would not make any inquiry beyond the Act itself.

---

21 [1965] A.C. 172.

22 See p.235, ante for the text of the dictum.

In that case, however, the Act was being challenged on the sole basis that the Standing Orders of the House had not been complied with.[23] It is well established that such matters as compliance with Standing Orders fall absolutely within the exclusive jurisdiction of Parliament as being "proceedings in Parliament." Such matters are notoriously within the exclusive jurisdiction of the Parliament and obviously no court would embark upon such an inquiry.

Similarly in The Countess of Arundel[24] the court declined to admit extrinsic evidence of the contents of the Journal in an attempt to show that there was an omission of a proviso from the terms of the Act. In effect it was intended to show that the Act should not have been passed without the proviso. It is not surprising that the court rejected such a contention. To have done otherwise would have been tantamount to the court itself legislating.

However, the House of Lords in the recent case of Pickin[25] seems to suggest that an Act of Parliament, once passed and put on the statute book, is final and conclusive. Thus Lord Morris of Borth-Y-Gest said:[26]

> When an enactment is passed there is finality .... In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all.

It is submitted that here too the court was concerned with "proceedings

---

23 Under Standing Orders, it was necessary to give notice to interested parties of intention to introduce a private Bill.

24 (1616) Hobart 109.

25 [1974] A.C. 765.

26 Ibid., 789.

in Parliament" as in Wauchope. Nonetheless, it is submitted, that the real reason for the courts in the United Kingdom declining to go behind the enrolled record is historical.[27]

In the early stages of the evolution of Parliament the business of law-making was, of course, for the King and his Council; law-making in the Council was a matter of discussion followed by written memoranda.[28] In some cases the result was a series of documents at various stages culminating in the legislation in its published form.[29] The constitutional struggle of 1258 and 1259 which led to the provisions of the Statute of Westminster is an example. The preliminary drafts of legislation eventually disappeared, and the minutes of the Council became the record of successive drafts until the final form of legislation was presented for approval at a special meeting. In most cases it would be a meeting of parliament but sometimes it would be a meeting of the King's Council with the magnates well represented. This form of procedure continued until the development of the common petition in the fourteenth century. During this time the task of drafting fell normally upon the ministerial members of the Council, especially the judges. The final draft was passed to the chancery with instructions to issue it. The document which the chancery received would be put in proper form and sent to the appropriate minister, including the sheriffs if the legislation was of general application. The intention was to have the contents read in open court and other public places and the document itself preserved for reference by local officers and for duplication.[30]

---

27 Beinart, loc. cit., 169. It is acknowledged that considerable assistance has been received on this section from Beinart's article.

28 A.G. Richardson and G. Sayles, "The Early Statutes" (1934) 50 L.Q.R. 540, 544.

29 Idem.

30 Idem.

In the early days various rolls had been used. However, when the Parliamentary roll and other rolls began to be differentiated, the former came to be regarded as virtually decisive in any question as to whether a document was a statute or other form of enactment.[31] Even after legislation came to be by means of a Bill which was not to be changed by the Crown, there was still considerable editing, rephrasing, and rearranging after the Bill had left Parliament.[32] It seems that those matters were also left to the justices or done under their supervision, and it was only after all these had been completed that the Act was enrolled.[33] It was natural, therefore, for judges to regard the statute on the Parliamentary roll as the best and final record of the matter, as they themselves for such a long time supervised its form. By 1341 there seems to have been only one Parliamentary roll which was the roll of the council in Parliament.[34]

The keeping of Journals in the Houses came into use much later. The Lord's Journals commenced in 1509 and the Common's Journals in 1547.[35] By this time of course the Parliamentary roll had already become accepted with respect. The Journals were not treated with the same respect and in fact there were doubts expressed as to whether they were matters of record at all.[36]

---

31 Beinart, loc. cit., 169.

32 Anson, The Law and Customs of the Constitution (5th ed., 1922), vol. 1., 262 - 263.

33 Beinart, loc. cit., 169.

34 Idem.

35 Idem.

36 Jones v Randall (1774) 1 Cowp. 17 where Lord Mansfield observed that the journals of the House of Commons was not a matter of record. Also in The Countess of Arundel (1616) Hobart 109, 110 the court stated:

> Now Journals are no records, but remembrances for forms of proceedings to the record, they are not of necessity, neither have they always been ....

All these developments, undoubtedly caused greater value to be placed on the copy of the Act on the Parliamentary roll and contributed to growing recognition of the enrolled Act as the conclusive or definitive copy. This explains why there are dicta which suggest that the Journal should not be admitted as against the Act. Thus in The Countess of Arundel[37] the court observed:

> But now suppose that the journal were every way full and perfect, yet it hath no power to satisfie, destroy or weaken the Act, which being a high record must be tried only by itself teste meipso.

The value of the Journals was stated thus:[38]

> The journal is of good use for the observation of the generalty and materialty or proceedings and deliberations as to the three readings of any bill, the intercourses between the two Houses, and the like, but when the Act is passed, the journal is expired.

In Bowes v Broadhead[39] the court held that they were to be ruled by the Parliamentary roll and not the Journal book. For these reasons, it is submitted, that in the United Kingdom, it can be confidently asserted that the courts would not admit evidence of Journals to answer the question whether what purports to be an Act of Parliament is in fact the authentic expression of the will of Parliament.

It is submitted that, if the Journals cannot be so admitted against the enrolled Act, then a fortiori oral evidence would be rejected. At least the Journals would be written up soon after the happening of the event in the House, and officials were taking down notes and would no doubt be specially engaged to do so, whereas in the case of oral testimony it would be necessary to rely on memories, which in comparison are notoriously fallible and less reliable. In this field the American

---

37 Idem.

38 Ibid., 111.

39 (1649) Style 155.

Courts have, generally speaking, been loath to allow the admission of oral evidence to challenge the validity of legislation on the ground that it is not the authentic expression of the legislature.[40]

However, the courts have not always regarded the enrolled record as the only evidence of the Act. Thus in R v John Hampden[41] there was no official record of Edward I's enactment de tallagio non concedendo. The court held it to be a statute because it had for a long time been treated as such, had been printed in books of statutes, and was recited in the Petition of Right of Charles I (1628) as a statute.[42]

In Great Eastern Railways Co. v Goldsmid[43] the question before the court related to an enactment of the first year of King Edward III (1327) but the document was one which did not appear upon the Rolls of Parliament, although these Rolls were extant and apparently perfect.[44] Despite this omission the majority held that it was

---

40 Beinart, loc. cit., 170; Hunt v Van Alstyne (1841) 25 Wend. 605 610 cited in Beinart, loc. cit., 170. In United States v Ballen, 144 U.S. 1 (1891) the Supreme Court went to the extent of saying that even if it could look at the journals, it could not go beyond them; see further Wigmore Treatise on Evidence (3rd ed., 1940), vol. IV, 683 et seq.

41 (1637) 3 St. Tr. 825.

42 Beinart, loc. cit., 170. The learned author observes:

> [T]he only original mention of [the enactment] as a statute appeared to be in the book of a monk historian, called Walsingham. Also the de tallagio had come down only in the narratives of certain chroniclers. See J.G. Edwards, English Historical Review, 58 (1943), pp. 273 ff., who after examining various possibilities comes to the conclusion that de tallagio was an incomplete, inaccurate, consolidated summary, of certain other authentic documents and by no means a statute.

43 (1884) 9 A.C. 927.

44 Ibid., 932 - 933, per Lord Selbourne L.C.

a valid statute - the document had been consented to by the King and Parliament, though it was in the form of a charter as in The Prince's case. Thus Lord Blackburn observed:[45]

> The authorities also shew, I think further that whenever it appears that a thing has been done in that way, and when it appears that by usage of the time, it being an early time, by contemporaneous usage or following usage things could have been done under that form of grant which could not validly and properly be done unless it was an Act of Parliament, - that is to say unless there was the assent of the three estatesin that way, - then, notwithstanding that it has not been entered on the Rolls of Parliament which would be the regular way, and which would shew beyond a doubt that it was an Act of Parliament, yet when there is this contemporaneous usage that is sufficient. That was the Prince's Case.

It is apparent that in the United Kingdom there is no absolute authority for saying that the existence or non-existence of the Act on the Roll and the evidence of the record itself, is always treated as conclusive proof that it is a valid or invalid statute and that no other evidence will be admitted to rebut the presumption of validity or invalidity.[46]

In other commonwealth jurisdictions too the courts have declared statutes invalid but in each of these cases, it is submitted the record did "carry its deaths wound in itself." Thus in Harris v Donges[47] the court was able to determine the non-compliance with the constitutional procedure from what appeared on the face of the instrument. The learned Chief Justice did leave the question undecided as to what would have been the position if the defect had not appeared on the face of the record. He merely observed:[48]

---

45 Ibid., 950.

46 Beinart, loc. cit., 171.

47 [1952] T.L.R. 1245.

48 Ibid., 1263.

> Had Act 46 of 1951 stated that it had been enacted by the King, the Senate and the House of Assembly in accordance with the requirements of sections 35 and 135 of the South Africa Act, it may be that Courts of law would have been precluded from inquiring whether that statement was correct ....

In Bribery Commissioner v Ranasinghe[49] the defect also appeared on the face of the instrument inasmuch as it was held that the certificate of the Speaker was a necessary part of the legislative process and the certificate did not appear on the face of the instrument.

B. The Position in Fiji

(1) General

The relationship between the English Parliament and the courts cannot be equated with the position in Fiji. As has been seen there are three principal reasons why the English Courts have not questioned the Acts of the English Parliament. They may be summarised as follows:[50]

First, the English Parliament is omni-competent. Its area of legislative powers is unlimited and there are no restrictions on the content of its legislation. As has been seen it has legislative supremacy.[51]

Secondly, both Houses of the English Parliament have extremely wide powers to legislate on any matter. There are no restrictions or limitations[52] as to the manner and form of legislation.

Thirdly, there is the historical basis and the concept of the High Court of Parliament.[53]

---

49 [1965] A.C. 172.

50 Heuston, op. cit., Ch. I.

51 Pp.188 et seq., ante.

52 Except perhaps to a limited degree under the Parliament Act 1911 and 1949.

53 Pp.161 et seq., ante.

It is submitted that these three factors were the main contributing elements to the attitude taken by the English courts that there could be no judicial review of Acts of Parliament. Accordingly, the courts would not admit evidence aliunde to challenge the validity of an Act and relied on the conclusiveness of the Act as enrolled. Only if the defect appeared on the instrument so enrolled, was the court put on enquiry.

However, as far as Fiji is concerned, different considerations apply, in view of its written Constitution and its entrenched provisions. This was aptly pointed out by Gavan Duffy J. when he said:[54]

> The principle that the Courts must take all Acts of Parliament as valid is understandable in England, where it has long been settled that Parliament has an unfettered supremacy. To apply it to this country is to overlook the difference between 'controlled' and 'uncontrolled' constitutions ....

The principles applicable in the United Kingdom and other countries with "uncontrolled" constitutions do not apply to Fiji, at least as regards the "manner and form" of legislation. As has been seen,[55] sections 67 and 68 of the Fiji Constitution provide for special procedures for certain classes of legislation and if compliance with those procedures cannot be inquired into, the essential restrictions imposed by the Constitution would be reduced to a nullity. The restrictions on the power of the legislature as to manner and form of legislation would be meaningless if the courts were bound to accept the conclusiveness of the enrolled Act. Those special procedures laid down by the Constitution have been put there for obvious reasons.

---

54 McDonald v Cain [1953] V.L.R. 411, 419 in reference to the Legislative Assembly of the State of Victoria.

55 Pp. 206 et seq., ante.

They are constitutional safeguards. Hence, it is submitted, the courts must of necessity inquire whether the Constitution has been complied with, should questions arise, and admit evidence aliunde if necessary. As Murray C.J. in Fowler v Pierce[56] observed:

> If such matters cannot be inquired into, the wholesome restrictions which the Constitution imposes on legislative and executive action become a dead letter, and Courts would be compelled to administer laws made in violation of private and public rights, without power to interfere. The fact that the law-making power is limited by rules of government, and its acts receive judicial exposition from the Courts, carries with it, by implication, the power of inquiring how far those exercising the law-making power have proceeded constitutionally .... It is said that parties would in every case dispute the existence of the law, and that such practice would lead to confusion and perjury. I have already said that this is a question for the Court. Any why should not the citizen whose life, property, or liberty is made forfeit by the operation of a particular law, be allowed to show to the Court, if it is not advised of the fact, that the same was passed in violation of his constitutional rights, or that it has been placed among the archives of government by fraud or mistake, and never had a legal existence? Is there no way of ascertaining whether the approval of the executive was forged, or whether officers have acted contrary to their constitutional obligations? It is no sufficient answer that we must rely on the integrity of the executive or other officers, and that the record of facts is conclusive evidence of the truth of such facts. Our notions of free institutions revolt at the thought of placing so much power in the hands of one man, with no guard upon it but his own integrity.

Thus if the self-imposed restrictions of the courts not to admit evidence of the Journals, or other evidence aliunde, to test the validity

---

56 2 Cal. 165 (1852), cited in Wigmore op. cit., 695. Cf. Pangborn v Young, 32 N.J.L. 29, 34 (1866); Evans v Browne 30 Ind. 514, 524 (1869); Ritchie v Richards, 14 Utah 345, 47 Pac. 670 (1896), Webster v Hastings, 56 Nebr. 669 (1898) and State v Jones, 6 Wash. 452, 34 Pac. 201 (1883), all cited in Wigmore, op. cit., para. 1350.

of an Act coming within the entrenched sections were adopted in Fiji, a situation would arise where a rule of evidence would permit what is not law to be treated as if it were. Certainly, this could not have been the intention behind the Constitution. The Fiji Constitution was accepted by the people on the basis that its provisions would be complied with by the judiciary, executive and legislature alike. However, under this rule of evidence, the legislature and the executive can connive to break the equilibrum of power. Thus if the legislature "passes" an Act contrary to the two-thirds majority required by section 67 (3) of the Constitution and the enrolment, as required by the Constitution,[57] merely reads "enacted by the Parliament of Fiji" the rule of evidence under discussion would preclude the courts from admitting evidence aliunde to show that the Act so passed did not secure the two-thirds majority. It is submitted that this is such a fundamental breach of the Constitution that the rule of evidence ought not to be followed in Fiji. In the United Kingdom, it is understandable inasmuch as if there is an error, or if legislation were enrolled which ought not to have been enrolled, the legislature could have the position rectified without much difficulty. However, in Fiji the error might strike at the validity of the Act, and may be difficult for Parliament to set right.[58]

It may be argued[59] that the presiding officer in the House is the best person to know exactly what transpired in the House; he would have had the benefit of first hand knowledge of the events; the votes

---

57 S. 53 (7).

58 For instance, if the legislation falls within s. 67 and the rectifying legislation requires two-thirds majority, it may be very difficult to secure the required majority. How could a validating Act be passed under such circumstances?

59 As was done in Hunt v Van Alstyne, 25 Wend. 605, 610, cited in Wigmore, op. cit., para 1350.

taken and the Journal would have been made up under his supervision and control. His means of ascertaining and determining what took place in the legislature when he declares the law to be passed, exceed those of any other tribunal that might be called upon to inquire into it. Besides, it may be said, the speed and relative carelessness with which the Journals are copied, and the modest importance attached to the printed copies, necessarily impair confidence in their correctness. Thus, it may be argued the Journals are a most uncertain basis upon which to found a judicial determination of the rights of subjects, let alone constitutional questions of great importance.[60]

It is submitted, that in practice the presiding officer of the House may not advert to the question of constitutional propriety of legislation when declaring a bill to have been passed. Also the bill may be of such a nature that constitutional issues involved may not appear on the face of the Bill. For example in Fiji in 1973, the Lands Sales Tax bill was presented to the House of Representatives and was duly passed by the House. When this bill was presented to the Senate, it was brought to its attention that the bill was one which contained provisions affecting subjects falling within the entrenched sections of the Constitution.[61] Hence the special procedure prescribed by those sections ought to have been complied with. The bill was then referred back to the House of Representatives. This is a concrete example of constitutional provisions being overlooked by the presiding officer, and for that matter by the House itself. The question arises: is the presiding officer the best person to rely on and should his certificate be accepted as conclusive?

It is also submitted that, although the Journals may be said to

---

60 See Wigmore, op. cit., para. 1350, and Beinart, loc. cit., 165 - 176.

61 Ss. 67 and 68.

be less reliable than the enrolled Act, the disparity in their authenticity is not as great as it used to be in the earlier days when this rule of the conclusiveness of the enrolled Act evolved. The Journals and the enrolled Act are both the work of officials who to some extent verify their authenticity. Furthermore, the final version of an Act is now settled by Parliament and the much earlier method of re-editing and re-phrasing is no longer in use.[62] Also in testing the validity of an Act, it is the essential requirements or rather pre-requisites that would be in issue,[63] and not the particular words or phrases. Accordingly, it is unlikely that there would be argument about the text of the enrolled Act.

It is submitted that, in any event, in English jurisprudence the cases in which the courts were asked to decide on the admissibility of other evidence, or to call in aid the assistance of the Journals, were cases where the alleged errors were of relatively little significance or were errors which did not affect the Act as it stood. Thus in The Countess of Arundel,[64] the question arose whether it was a valid Act because a proviso had been omitted from the Act. This omission, it is submitted, had nothing to do with the validity or invalidity of the Act in question. The proviso would merely have added to the meaning of the Act and to its application and interpretation. The Act could stand without the proviso. There is a material difference between challenging the contents of an Act and challenging its validity. In the former case, there may be inaccuracies, but there is a valid Act. Even if there are obvious mistakes made on the part of the legislature, the Act will still be valid. At most, the courts would be concerned with the application

---

62 See pp. 243 et seq., ante.

63 E.g. whether the Bill secured the consent of six of the eight senators appointed on the advice of the Great Council of Chiefs (s. 68).

64 (1616) Hobart, 109.

and interpretation of the Act and questions of mistake would be taken care of by the rules of statutory interpretation.[65]

Similarly, as has been seen,[66] in Edinburgh and Dalkeith Railway v Wauchope[67] and British Railways Board v Pickin,[68] the Acts in question were being challenged on grounds which were notoriously within the exclusive jurisdiction of Parliament and obviously no court would embark upon such enquiries.

It is contended, however, that where the fundamental requirements of validity are in dispute, the courts ought to go beyond the enrolled copy to enquire into the validity or invalidity of an Act of the Fiji Parliament. In such cases not only the Journals but also the oral evidence of officials or members of either House should be admissible in evidence. This is not to say, however, that the courts should prefer one kind of evidence to another. The courts will attach such weight to the evidence adduced as it does in other cases. No doubt, as will presently be seen,[69] the courts would act on the presumption of the validity of the legislation, thereby placing the onus on the party asserting invalidity to establish this. Nonetheless the right so to challenge ought to exist. After all, why should a rule of evidence be a decisive factor in a matter so fundamental as compliance with a Constitution?

The court has a duty to see that the constitution is not

---

65 Maxwell, op. cit.

66 Pp. 241, et seq., ante.

67 (1842) 8 Cl. and F. 710.

68 [1974] A.C. 765.

69 See pp.325 et seq., post.

> infringed and to preserve it inviolate. Unless, therefore, there is some very cogent reason for doing so, the court must not decline to open its eyes to the truth.[70]

The English rules cannot really be applied to Fiji because in the constitutional position of the United Kingdom there are no fundamental requirements of legislation that need to be complied with.

> The English authorities have taken a narrow view of the court's power to look behind an authentic copy of the Act.[71]

One of the reasons for the English courts taking the view they did was recognised by Lord Pearce when he said:[72]

> But in the Constitution of the United Kingdom there is no governing instrument which prescribes the law-making powers and the forms which are essential to those powers. There was, therefore, never such a necessity ... for the court to take any close cognisance of the process of law-making.

Although the Fiji Constitution permits each House to regulate its own procedure,[73] it nonetheless makes specific mandatory provisions for the quorum of each House and for the adjournment of the House in the absence of the requisite quorum.[74] There are also entrenched provisions requiring special majorities for the passage of certain legislation.[75] It is submitted, that it certainly could not have been

---

70 Bribery Commissioner v Ranasinghe [1965] A.C. 172, 194.

71 Ibid., 195, per Lord Pearce.

72 Idem.

73 Constitution, s. 54.

74 Ibid., s. 58.

75 Ibid., ss 67 and 68.

the intention that the courts could not inquire whether these provisions had been complied with. It would be unrealistic and unreasonable if such fundamental provisions as sections 67 and 68 were to give way to a law of evidence evolved at a time and in a country without comparable constitutional provisions and without entrenched and fundamental requirements for legislation.

Also it is submitted that the enrolment is only an official's certificate and copy, whereas the effective legal act of enactment is the dealing of the legislature with the original document, that is, the viva voce vote, or the votes recorded on a division. The legislature does not deal by vote with the enrolled document; the latter therefore can be only a certificate and record of the enactment.[76] It is not suggested that the legislative journals are the original enactment, for the viva voce vote is not recorded in them. They are, it is submitted, official statements of what has been done at an earlier time, although the House may have heard them read and may have approved them as correct. Thus the question whether the enrolled copy should be conclusive as against the Journal is only a question whether an official report and copy of one degree of solemnity and trustworthiness is to be preferred against another of a lesser degree. It is submitted that this is an inquiry that must be left to the courts to adjudicate upon as a question of fact, should the occasion arise.

Furthermore, as regards the certificate of the Speaker, section 66 of the Constitution makes certain certificates of the Speaker in regard to appropriation bills, money bills and a few other bills and certain aspects of the procedure involved in passing such bills conclusive for all purposes and beyond question in any court of law. In contrast, there is no other provision whatsoever, either in the Constitution or elsewhere, making the certificate of the Speaker necessary

---

76 Wigmore, op. cit., para. 1350.

or giving conclusive effect to the enacting words of an Act. There is not even a provision requiring "enrolment" of Acts of Parliament. It is submitted that the expressio unius est exclusio alterius rule would apply. Thus if there is specific provision for the certificate of the Speaker to be conclusive and beyond judicial review for one purpose, and if there were an intention to exclude judicial review from the compliance by the Houses of Parliament of the other mandatory provisions of the same instrument, a similar provision for the conclusive effect of the enacting words or the requirement of a certificate of the Speaker and its conclusiveness would have appeared.

It has also been seen that section 53 (7) of the Constitution provides for the use of certain words of enactment, but no conclusive effect is given to the enacting words of a bill. It is submitted that, at most, the effect of the enacting words is to create a strong presumption in favour of validity. It is merely a presumption and no more.

Thus in R. v Ndobe[77] in holding that the Court had power to enquire into the question whether an Act had been validly passed by Parliament, De Villiers, C.J. stated:[78]

> The Court naturally assumes, until the contrary appears, that any Act of Parliament has been validly passed.

It is important to note that the court accepted that the contrary could appear by some indication in the Act itself "or proof aliunde."[79]

In P.S. Bus Co. Ltd v Members and Secretary of Ceylon Transport Board,[80] the problem confronted the courts in a somewhat complex

---

77 [1930] S.A.L.R. 484.

78 Ibid., 497.

79 Idem.

80 (1958) 61 New Law Reports 491 (Ceylon).

form. The plaintiff sought to challenge the validity of an Act on the ground that the House of Representatives was not properly constituted when the Act in question was passed inasmuch as one member was not rightfully elected. The plaintiff's petition for one of the prerogative writs was refused in the exercise of the discretion of the court. However, the learned judge made some observations relevant to the issue under discussion. His Lordship pointed out that section 38 of the Ceylon Constitution (as it then was) provided for the use of certain words of enactment. He referred to section 35, which made declarations of the Speaker conclusive in certain money and other bills. In contrast, he observed that no conclusive effect was given to the enacting words of a bill under section 38. Nevertheless, his Lordship stated that[81] "the effect of the enacting words is at least to create a strong presumption in favour of validity." The court found that the plaintiff's allegation was insufficient to show that the legislation was invalid. This was important because the court did look behind the enacting words to inquire whether Parliament had been properly constituted. On the question of the presumption of validity, it may logically be inferred that the enacting words are not conclusive, though they create a strong presumption of validity. In other words, the courts would commence with the premise of validity until the contrary is proved. Accordingly, it follows that the court can go behind the enacting words to inquire into the procedure required for the passage of legislation in order to determine whether it was in accordance with the provisions of the Constitution. It is of particular importance that in the above case the court did embark upon such an inquiry. It is conceded that the question of "procedure" was not raised in the strict meaning of the term, as was the case say in Harris v Donges.[82] Nevertheless, in its wide

---

81 Ibid., 495.

82 [1952] T.L.R. 1245.

sense "procedure" is used to include such matters as the very constitution of Parliament as in the case being discussed.

It is not submitted that in every case the courts should agree to admit evidence aliunde to question the enrolled Act. A distinction must be drawn between fundamental provisions striking at the validity of legislation on the one hand and questions relating to non-fundamental rules for passing legislation. In cases involving fundamental constitutional propriety, the court must investigate, should the question be raised, whether the relevant provisions of the Constitution have been complied with. Thus in Fiji the courts must enquire whether the requirements of the Constitution have been satisfied and, if necessary, admit the Journals and other evidence aliunde to ensure that there has been the observance of the mandatory provisions, especially those relating to the power and authority to enact a law. In any event, it is submitted, that the courts in Fiji ought to be very reluctant to disregard a breach of a constitutional requirement. Whatever appears in the Constitution is usually treated as being fundamental.[83] In any event the Fiji Constitution does not have provisions dealing with trivial matters of detail such as the manner of the reading of a bill.[84] It has been left to each House to settle its own internal proceedings.[85]

Thus where the Fiji Constitution, as opposed to the Standing Orders of either House of Parliament, expressly requires certain legislative procedures to be observed, compliance is a question very rele-

---

83 W. F. Dodd, (1931) 80 Univ. Pensyl. L. Rev. 61, 69 and 77. Cf. J.A.C. Grant, "Judicial Control of Legislative Procedure in California," (1949). 1 Stanford L. Rev. 428. The contrary view seems to have taken by the Fiji Court of Appeal in Madhavan v Falvey (unreported, Civil Appeal No. 39/1973) which is discussed at pp. 674 et seq., post.

84 This is the position in several States in the United States of America: Wigmore, op. cit., para. 1350.

85 Constitution, s. 54.

vant to the validity of legislation, and evidence ought to be admissible in judicial enquiries as to their observance. This affects the very "jurisdiction" or powers of the Fiji Parliament. As has been seen earlier,[86] the legislative power of the Fiji Parliament is contained in section 52 of the Constitution and this section commences with the limiting phrase "Subject to the provisions of the Constitution ... Parliament may make laws ...." Hence Parliament cannot act until and unless it complies with the mandatory provisions and restrictions of the Constitution. The dynamic and static concepts of the Fiji Parliament have been discussed at length elsewhere.[87] It has been seen that as a static concept, Parliament is simply the elements which comprise it - viz. The Queen, the Senate and the House of Representatives. The dynamic concept, on the other hand, has reference to the above elements functioning as a law-making body. In this latter concept there has been a functional distribution of legislative powers among the constituent elements referred to above. It has already been said[88] that the Fiji Constitution contains special provisions and rules in accordance with which the constituent elements of Parliament must "combine for action". Thus with regard to matters coming within the entrenched sections,[89] the legislative power belongs to the afore-mentioned elements functioning with certain specified majorities and in respect of other matters legislative power belongs to the aforementioned elements functioning with an ordinary majority.[90] Accordingly, it is submitted, that the court must inquire whether the body that purported to enact the legislation in question was in fact Parliament as a dynamic

---

86 P. 212, ante.

87 Pp. 206, et seq., ante.

88 P. 207, ante.

89 Constitution, ss. 67 and 68.

90 Except of course for matters coming within 61 - 65 of the Constitution.

concept within the meaning of the Constitution.

Furthermore, the Constitution prescribes the form of enactment as "Enacted by the Parliament of Fiji".[91] Thus normally even if the mandatory provisions of the entrenched sections had not been complied with, there would be nothing in these words which could possibly show any defect on the face of the instrument. Even the normal certificates of the President of the Senate and the Speaker of the House of Representatives show the words "passed by the Senate" or "passed by the House of Representatives" respectively. Even from the word "passed" the court would not infer that it was passed by ordinary majority as opposed to special majorities. Thus in Akar v Attorney-General of Sierra Leone[92] the plaintiff successfully challenged the validity of a purported amendment to the Constitution of Sierra Leone.[93] The entrenching section, section 43, imposed two requirements by which the validity of the amendment was to be tested. The first requirement was that the amendment must be passed by two successive sessions of the House of Representatives without any intervening dissolution of Parliament. There was no problem as to the evidence by which a failure to comply with this prescription was established, as this fact either seems to have been admitted or taken judicial notice of.[94] Secondly, there was to be a two-third majority. The printed copy of the Act was endorsed merely as having been "passed" without any indication as to the majority received. The Court also considered in this case the effect of another amendment to the Constitution,[95] passed in the same year, where the endorsement

---

91 S. 53 (7).

92 [1970] A.C. 853.

93 Act. No. 12 of 1962.

94 [1970] A.C. 853, 866, per Lord Morris of Borth-Y-Gest; see text to n. 96 post.

95 Act No. 39 of 1962.

expressly recited that the provisions of the entrenching section had been complied with.

The appellant argued, inter alia, that the purported amendment, that is Act No. 12, was ultra vires the Constitution, inter alia, on the ground that as the endorsement merely recorded that the bill was "passed", it should be inferred that it was passed in the ordinary and not in the special manner laid down by section 43 of the Constitution. However, the Privy Council, in spite of the fact that it was also considering Act No. 39 (which had the full endorsement to show that the entrenching sections had been complied with)rejected the argument of the appellant. The Judicial Committee held that there was no basis for any suggestion that the bill amending the Constitution was not properly passed or for supposing that a procedural requirement was forgotten or ignored.

It is submitted that the Privy Council tacitly accepted that a court is entitled to go behind an Act of Parliament to see whether a special legislative procedure has been complied with. All that the Judicial Committee held was that it was not prepared to infer that the procedure was not followed. After all, the appellant in this case was merely contending that it should be inferred from the word "passed" that it was passed in the ordinary manner and not in the special manner. It is submitted that had there been evidence forthcoming to show that the special procedure prescribed had not been followed, the Privy Council would have examined it and would not been asked to draw an inference which it felt was unsupported. In this case the Privy Council did take cognisance of the fact that Act No. 12 infringed the first of the special requirements mentioned above, namely, that the Act was not passed by two successive sessions of Parliament because there was a dissolution of Parliament intervening between those sessions. Thus Lord Morris of Borth-Y-Gest

stated:[96]

> Act No. 12 admittedly did not result from a bill passed by the House of Representatives in two successive sessions, there having been a dissolution of Parliament between the first and second of those sessions.

The Judicial Committee held that Act No. 12 was invalid on this ground inasmuch as there was evidence of this defect. Certainly this "defect" did not appear on the face of the instrument. It was a fact proved otherwise than by the enrolled Act itself.

This case clearly shows that the Privy Council accepted the principle that an Act of Parliament is presumed to be validly passed until the contrary is proved or shown. This is in accordance with the pronouncements of the courts of South Africa and Ceylon referred to above.[97]

Thus, it is submitted that the courts are entitled, even obliged to inquire whether the body which purported to legislate was in fact "Parliament" as a dynamic concept as defined in the Constitution, that is, Parliament as defined for the purposes of the kind of legislation in question. In Fiji, where compliance with the Constitution is fundamental to the validity of an Act, the courts would be bound to go behind the enrolled Act and enquire into the validity of the enactment, even if it means admitting the less authentic journals or oral evidence. The category of constitutional provisions include those relating to the quorum and the majorities required under sections 67 and 68. However, the courts would not inquire into matters not so fundamental or matters

---

96 [1970] A.C. 853, 866.

97 R v Ndobe [1930] S.A.L.R. 484, and P.S. Bus Co. Ltd v Members and Secretary of Ceylon Transport Board (1958) 61 New Law Reports 491 (Ceylon).

of an intra-Parliamentary nature such as whether a member voted or not and/or whether his vote was counted; or whether a member voted who ought not to have voted.

It is submitted that the questions on which the courts must pronounce may be formulated as follows:

(a) Whether either House had the power and authority to enact the law in question.[98]

(b) Whether it could do so in the manner and form it followed.

(c) If these two questions can be answered in the affirmative, then any other defect will not be of a fundamental nature and the Courts ought not to admit evidence aliunde when looking behind the enrolled Act.

Thus it may be concluded that the whole tenor of the Fiji Constitution manifests an intention that no bill shall become law or be passed unless it has been enacted in accordance with the Constitution.[99] That intent is clear in regard to the entrenched provisions requiring special majorities. The passage by such majorities is made a condition precedent for valid enactment. It is a question of fact whether such a condition has been satisfied and this is determinable by judicial inquiry.[1] Such inquiry into the requirements of legislation is obviously necessary if the distinction between ordinary legislation and legislation falling with the entrenched sections, and therefore requiring special majorities, is to be effective. If the rule of evidence that prevails in the United Kingdom was to be applied in Fiji without qualification, the distinction would not have any effect and the limitations imposed by the Constitution would be of very little value, if any.

---

98 This will include the question of quorum and the general power of the House to deal with the Bill.

99 This will include compliance with ss. 67 and 68 of the Constitution.

1 Ranasinghe v The Bribery Commissioner (1962) 64 New Law Reports 449, 454.

Accordingly, it is submitted that the courts in Fiji have a right, even a duty, to go behind the enrolled Act and enquire whether the legislation was passed without jurisdiction in the sense of being in defiance of the mandatory provisions of the Constitution, or by the exercise of powerwhich the legislature does not possess, and to determine whether there was some lack of power or capacity under the provisions of the Constitution from which it derives its power.

However, in Fiji, there is a statutory provision, section 16 of the Parliamentary Powers and Privileges Ordinance 1965,[2] which endangers the effectiveness of judicial review. This is the provision which renders inadmissible evidence as to the proceedings of the Houses of Parliament in the absence of the permission of the House in question. Accordingly this provision requires close examination.

(2) Section 16 of the Parliamentary Powers and Privileges Ordinance

Section 16 is a potential major obstacle in the path of the suggested conclusion that the courts in Fiji have a right and duty to go beyond the enrolled Act and if necessary to admit evidence aliunde in order to decide the validity of the Act in question. This provision is not an

---

2 Section 16 provides:

(1) Save as provided in this Ordinance, no member or officer of the House of Representatives or the Senate and no person employed to take minutes of evidence before the House of Representatives or the Senate or any committee shall give evidence elsewhere in respect of the contents of such minutes of evidence or of the contents of any document laid before the House of Representatives or the Senate or such committee, as the case may be, or in respect of any proceedings or examination held before the House of Representatives or the Senate or such committee, as the case may be, without the special leave of the House of Representatives or the Senate first had and obtained.

(2) The special leave referred to in the last preceding sub-section may be given during a recess or adjournment by the Speaker or President or, during any dissolution of the House of Representatives or the Sentate, by the Governor-General.

innovation for Fiji. It can be traced to the common law position in England. In Chubb v Salomons,[3] it was held that Members of Parliament cannot be compelled to give evidence regarding proceedings in the House of Commons without the permission of that House. This of course also conforms to Article 9 of the Bill of Rights.[4] Hence in 1818 a resolution of the House of Commons directed that no clerk or officer of the House, or short-hand writer employed to take minutes of evidence before the House, or any committee thereof, should give evidence elsewhere, in respect of any proceedings or examination at the bar or before any committee of the House, without the special leave of the House.[5]

It is submitted that section 16 is an attempt to preclude judicial review of legislation and hence it is unconstitutional. It has been held, both in the United States of America and India, that such an attempt on the part of the legislature to prevent attack upon the constitutionality of legislation is itself unconstitutional. Thus in United States v Carolene Products Co.,[6] the American Supreme Court held that a statute which precludes the proof of facts which would show that the statute deprived the suitor of life, liberty or property, without a rational basis, per se violates due process. In the words of the Court:[7]

> [A] statute would deny due process which precluded the disproof in judicial proceedings of all facts which would show or tend to show that a statute depriving the suitor of

---

3 (1851) 3 Car. & Kir. 75.

4 Generally, see Erskine May, Parliamentary Practice (18th ed., 1971), 85 et seq.

5 C.J. (1818) 389; Parl. Deb. (1818), 968 - 974.

6 304 U.S. 144 (1938).

7 Ibid., 152.

life, liberty or property had a rational basis.

In India, it has been held that any law which seeks to bar or render illusory the powers of the Supreme Court under Article 32 of the constitution is void,[8] because the right to move the Supreme Court for the protection of the fundamental rights is itself guaranteed by that Article.[9] Thus in Gopalan v State of Madras[10] the Court struck down a Statutory Order because it rendered nugatory the power of the Court to test the validity of an order of preventive detention by reference to the constitutional requirements, by withholding from the Court the only materials on which the Court could determine whether the detention was proper or whether the grounds on which the order had been made were relevant to the purposes for which preventive detention is authorised by the Constitution. In this case, section 14 of the Preventive Detention Act 1950 prevented the person detained, on pain of prosecution, from disclosing to the Court the grounds of his detention communicated to him by the detaining authority and thus prevented the Court from being informed of the substance of the grounds. This provision did not formally take away the right of the detained person to move the Supreme Court for a writ of habeas corpus under the Constitution;[11] but nevertheless the Court felt that it rendered the exercise of the Supreme Courts' powers under Article 32 nugatory and illusory. Unless the Court was able to look into and examine the grounds upon which the detention order had been made, it was impossible for the Court to decide whether any of the rights guaranteed to the detained person under the Constitution had been infringed. The rights of the detained person would, for all practical purposes, be rendered unenforceable if the Court was denied

---

8 Gopalan v State of Madras A.I.R. (1950) S.C. 88.

9 Kochunni v State of Madras A.I.R. (1959) S.C. 725.

10 Supra.

11 Art. 32.

access to the grounds of detention supplied to the detainee. Since section 14 of the Act in question materially affected the fundamental rights of the detained person, the court declared it illegal and ultra vires.[12]

As regards Fiji, it has been seen that certain mandatory provisions of the Constitution determine the very power of the Parliament to function at all under the Constitution. It has also been seen that in Fiji the courts are the guardians of the Constitution. Ultimately it is for the courts to review and decide whether legislation is within the bounds of the Constitution. It is also the right of every subject to move the Supreme Court for relief under sections 17 and 97 of the Constitution. While it is conceded that section 16 of the 1965 Ordinance does not directly and formally curtail this right to move the Supreme Court for relief, it does in effect render the powers of the Supreme Court nugatory and illusory. Obviously, unless the Supreme Court, as of right, is able to examine, and if needs be, admit in evidence the manner and form of legislation, it is impossible for the Court to decide whether the mandatory provisions of the Constitution have been complied with. After all, the persons who will be in the best position to give evidence on these matters are those precluded from doing so by section 16. To produce any record, journal or other document would require the evidence of the clerk or other person having access to the original. This follows from Chubb v Salomons,[13] where it was held that an entry in a printed copy of the journals of the House of Commons is not receivable in evidence unless it has been compared with some original at the House. It was also held that a copy of an entry in the minute book kept by the clerk

---

12 See also Lilavati v State of Bombay, A.I.R. (1957) S.C. 521, 528.

13 (1851) 3 Car. & Kir. 75.

at the table of the House was admissible in evidence in a court of law if the copy has been examined and compared against the original.[14]

As has been seen, the entrenched sections 67 and 68 of the Constitution clearly prohibit either House of Parliament from passing legislation unless the entrenched provisions have been complied with. Thus these provisions affect the very capacity of either House to legislate. They therefore affect the very jurisdiction of either House in its legislative capacity.

The availability of judicial review is, in the constitutional system of Fiji, the necessary premise of legal validity. It is no doubt logically possible for the legislature to keep within imposed limits. For the most part it does so. Yet there is in Fiji's society and her constitutional arrangements a profound, traditional-taught and constitutionally-created reliance on the court as the ultimate guardian and assurance of the limits set upon the executive and the legislative powers by the Constitution.[15] The guarantee of legality by an organ independent of the executive or legislature is one of the profoundest, and most pervasive premises of the Fiji system. In effect, section 16 fetters the Supreme Court in the exercise of its powers to investigate the very questions which the Court is empowered to do under the Constitution. Accordingly, it is submitted that section 16 is unconstitutional as it is inconsistent in its effect with the provisions of the Constitution inasmuch as it attempts to preclude judicial review of the very matters referred to in the entrenched sections. These are matters very much within the province of the Courts. This appears to be so, as we have seen, not only from the assumption on which the

---

14 See also Trial of Lord Melville (1806) 29 St. Tr. (Howell) 685 and Forkes v Samuel [1913] 3 K.B. 706, 720.

15 See Ch. V pp. 183 et seq., ante.

Constitution was framed but also from its express terms, particularly sections 10, 17, 97 and 98. Any provision in a statute which attempts to oust the jurisdiction of the courts or attempts to fetter the exercise of the jurisdiction which the Constitution confers would be inconsistent with the Constitution and hence invalid. A right conferred by the Constitution cannot be taken away or curtailed by an enactment falling short of a constitutional amendment. Thus in Balewa v Doherty[16] the Privy Council had to consider inter alia, a provision of an Act of Parliament which provided: "neither the commission itself nor any action of the Prime Minister in relation thereto shall be inquired into in any court of law." The Judicial Committee of the Privy Council, in affirming the decision of the Supreme Court of the Federation of Nigeria, held that this provision was invalid by virtue of sections 21, 31, and 108 of the Constitution, being provisions substantially similar to sections 10, 17, 97 and 98 of the Fiji Constitution.

It is submitted that section 16, the subject of the present discussion, is unquestionably unconstitutional in that it infringes at least sections 97 and 98 which secure to citizens of Fiji the protection of their rights and interests before the Supreme Court. The former section provides in part:

> If any person alleges that any provision of this Constitution ... has been contravened and that his interests are being or likely to be affected by such contravention ... that person may apply to the Supreme Court for a declaration and for relief under this section.

The validity of this submission may be tested by an example.

Let us assume that the Fiji Parliament intends to deprive a

---

16 [1963] 1 W.L.R. 949.

certain class of persons - say class A - of their citizenship and that the government has not the support of three quarters of all the members of the House. To pass a discriminatory law of this nature, Parliament has to remove the protection of section 15 (which deals with anti-discriminatory laws) and chapter III (which deals with citizenship generally) from the entrenched sections. Before the passage of the bill removing this protection, the Speaker of the House of Representatives and the President of the Senate respectively have, we are to assume, ordered the withdrawal of all strangers from the Senate.[17] This has been done because strangers are apparently not precluded from giving evidence of the proceedings in Parliament by section 16. The presiding officer in either House may then put the bill to a vote and certify the bill in terms of the enacting clause[18] as "Enacted by the Parliament of Fiji". Parliament would then be able to pass legislation in as discriminatory a manner as it desired and thereby deprive persons belonging to class A of their citizenship. Should a person who is affected by such legislation question it on the ground that the initial removal of section 15 and Chapter III from the entrenched sections had not been passed in accordance with the requirements as to manner and form he would face great difficulties. The whole enquiry would be at the mercy of the Houses of Parliament, the Speaker, the President, or the Governor-General, as the case may be, depending on whether Parliament is in session or not.[19] Under section 16, no person will be able to give evidence of the proceedings or adduce any evidence from the records without special leave being given. The hypothetical applicant's right to move the court under section 97 of the Constitution will have been rendered illusory and nugatory.

---

17 Under the powers of s. 8 of the Parliamentary Powers and Privilege Ordinance 1965.

18 Constitution, s. 53 (7).

19 S. 16(2) of the 1965 Ordinance.

Therefore the effect of section 16 is to attempt to withhold from the Court the only materials on which the Court could determine whether the mandatory provisions of the Constitution have been complied with. The entrenched sections are fundamental provisions which affect the "jurisdiction" and "capacity" of either House of Parliament. If the special leave required under section 16 is not forthcoming, the citizen so affected in our hypothetical case will be left without a remedy. This certainly strikes at the root of the protection and rights granted by section 97 of the Constitution. Hence it is reiterated that section 16 is unconstitutional. It is immaterial that this section is part of an Ordinance passed prior to the adoption of the present Constitution. Section 2 of the Constitution declares that the Constitution is the supreme law of Fiji and, if any other law is inconsistent with it, the Constitution shall prevail.[20]

It is submitted that the courts in Fiji ought to approach with suspicion any legislation which may affect their jurisdiction or be a fetter on the exercise of their jurisdiction. It is clear that the country looks, and with good reason, not to the legislature or the executive, but to the courts for its ultimate protection against any breach of the Constitution. The need for judicial protection has undoubtedly differed in various countries and the risks of judicial sabotage under the guise of protection are considerable.[21] But we are dealing with basic institutions and basic attitudes; we must take the bad with the good, the fortuitous with the exigent, the trivial with the necessary. Thus Louis L. Jaffe aptly observed:[22]

> The scope of juducial review is ultimately conditioned

---

20 The subject of the effect of the inconsistency between the Constitution and other laws are dealt with in detail elsewhere, see pp. 389 et seq., post.

21 Cf. the New Deal era in the U.S. and early independence days in India.

22 "Judicial Review: Question of Law," (1955-1956) 69 Harv. L. Rev. 239, 274.

and determined by the major proposition that the constitutional courts of this country are the acknowledged architects and guarantors of the integrity of the legal system. I use integrity here in its specific sense of unity and coherence and in its more general sense of the effectuation of the values upon which this unity and coherence are built. In a society so complex, so pragmatic as ours, unity is never realised, nor is it necessary that it should be. Indeed there is no possibility of agreement on criteria for absolute unity; what is contradiction to one man is higher synthesis to another. But within a determined context there may be a sense of contradiction sufficient to create social distress; and it is one of the grand roles of our constitutional courts to detect such contradictions and to affirm the capacity of our society to integrate its purposes .... [The Legislature] is not an island entire of itself. It is one of the many rooms in the magnificent mansion of the law. The very subordination of the [Legislature] to judicial jurisdiction is intended to proclaim the premise that each agency is to be brought into harmony with the totality of the law; the law as it is ... associated with the Constitution.

CHAPTER VIII

PARLIAMENTARY PRIVILEGES AND THE COURTS

A Introduction

Any comprehensive analysis of the relationship between the Judiciary and the Legislature would be incomplete without a discussion of parliamentary privilege. Its significance is amply illustrated by the constitutional struggle in English history between the conflicting claims of Parliament to exclusive jurisdiction in certain matters on the one hand and the Court's assertion of the paramountcy of judicial review on the other.[1] The conflict and its resolution resulted in consequences of great importance for English constitutional jurisprudence.

The question of the limits, if any, on parliamentary privilege is also of paramount importance in Fiji in view of two principles enshrined in the Constitution - first, there is the supremacy of the Constitution[2] itself over any legislative act or power of Parliament and secondly there is the right of the subject to seek judicial relief if there is any infringement of the provisions of the Constitution.[3] In this chapter, we shall examine the relationship in Fiji between the Courts and Parliament from the aspect of parliamentary privilege and the extent and scope of judicial determination.

The Position in England

Parliamentary privilege is a subject which is fundamental

---

1 See p.282 post.

2 See pp.210 et seq., ante.

3 See Ch.V pp.183 et seq., ante.

to parliamentary procedure in the sense that it provides the means of protecting Parliament, and, through Parliament, individual members in the performance of their functions. Thus the privileges of Parliament refer to those rights, powers and immunities which in law belong to the individual members and officers of a Parliament and to the House(s) of Parliament acting collectively. Thus Erskine May speaking of the position in the United Kingdom states:[4]

> Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceeded those possessed by other bodies or individuals.

Thus there are two levels of these privileges - one for the members which are enjoyed by them individually [5] and one for each House which can be enjoyed by the House collectively [6] or the House as a whole as distinct from its individual members. Since the question of privileges of Parliament and its relations

---

4 Erskine May, Treatise on the Law Privileges, Proceedings and Usages of Parliament (18th ed., 1971), 64.

5 E.g., freedom from arrest, immunity of members from legal liability for assertions made during the course of parliamentary proceedings, freedom from certain legal processes, etc.

6 E.g., to exclude strangers from the House, to regulate internal proceedings, to suspend and expel members and to punish for contempt.

to the courts stems from the English Common Law, it will be useful to survey briefly the development and the position of parliamentary privilege in the United Kingdom.

Such privilege was not established by any one statutory provision but has evolved gradually. One significant factor is that, as has already been seen,[7] the English Parliament began its history as a court of justice - the High Court of Parliament.[8] Hence, some of the privileges of English Parliament resemble those of courts of law; for example, the inherent power to punish for contempt. In the early years, two important privileges were won in judicial matters. First, the Commons asserted their right to impeach. This is the prosecution of an offender by the Commons in Parliament.[9] Secondly, the Lords in 1341 made good their claim to trial by their peers.[10]

Most privileges arose out of conflicts between monarchs and Parliament or courts and Parliament. It is well known how King Charles I in his high-crowned black hat was met by muttered cries of "privilege, privilege" as he walked up the floor of the House of Commons to convey to Speaker Lenthall his demand for the arrest of the five members who opposed his policy of taxation.

---

7 See pp. 161 et seq., ante.

8 For a fuller treatment of this aspect of the development of parliamentary privilege in Great Britain see E. Campbell, Parliamentary Privilege in Australia (1966), 3 et seq.

9 The first instance of impeachment was that of Lords Latimer and Neville (the Chamberlain and Steward) and certain commoners (chief of whom was one Richard Lyons, a trusted agent of the King), by the Good Government, in 1376: Fielden, op. cit., 21.

10 Idem. Various legislation was passed regarding this freedom. For the legislative history and an account of this privilege, generally, see Anson, op. cit., 164 - 166.

Similarly well known are the roles of John Wilkes and Joseph Stockdale.[11]

Under the Lancastrian Kings, the House of Commons acquired new powers and privileges. Freedom of speech and debate of course existed from very early times, and had been frequently confirmed by legislative and judicial sanctions.[12] In 1397 Sir Thomas Haxey was imprisoned by order of King Richard II and found guilty of treason for having introduced a bill to regulate the expenses of the Royal household; the proceedings against him were reversed, however, in 1399 by King Henry IV and the Lords. This privilege of freedom of discussion was expressly recognized and reconfirmed in 1407.[13] The Commons' right to freedom of deliberation was fully recognized in 1401.[14] In 1429 Members of Parliament were allowed freedom from arrest[15] during the duration of the session and for forty days before its commencement and after its conclusion.

Later there was a demand for access to the Crown, greater security for freedom of speech, and freedom from arrest.[16] Thus from 1541 the privileges of free discussion, free access to the

---

11 Heuston, op. cit., 82.

12 Fielden, op. cit., 16. E.g., 4 Hen. VIII, c. 8 declared all suits in consequence of words spoken in Parliament void. See also Anson, op. cit., 166 et seq.

13 Idem.

14 Ibid., 23 and 103.

15 Idem.

16 Erskine May, op. cit., 67.

Crown and freedom from arrest, were formally claimed by the Speaker at the commencement of each Parliament, and formally recognized by the sovereign.[17] Subsequent monarchs sometimes violated these privileges[18] but the Bill of Rights in 1688 secured them for all time. The Bill of Rights declared, inter alia, that:

> the freedom of speech and debates, or proceedings in parliament, ought not to be impeached, or questioned, in any court or place out of parliament.

From then onwards there was no direct interference with the freedom of speech as such.[19]

Secrecy of debates also became a privilege of Parliament. In the early days, it was very important that the King should not know what was being debated because the King then retained some powers over Parliament and the subjects discussed therein. The Long Parliament of 1641 was the first to prohibit the printing of speeches without the leave of the House.[20] Thus in 1680 votes and proceedings were ordered to be printed under the dir-

---

17 Idem. Also see Anson, op. cit., 163 et seq.

18 Fielden op. cit., 107 - 108.

19 However, there was indirect interference: e.g. the cancelling of the Commission of General Cornway, who, in 1764, voted against the government on the question of General Warrant: Fielden, op. cit., 243.

20 Sir E. Dering was expelled and imprisoned for failing to comply with this rule: Fielden, op. cit., 109.

ection of the Speaker.[21]

Initially the exclusion of strangers from Parliament, was very strictly adhered to because of the fear that an outsider might inform the King of the proceedings in Parliament. After the Restoration however, the rule was somewhat relaxed. But the privilege was invoked on the grounds of expediency during times of emergency, such as during the war with Spain and the American War of Independence. However, since 1875, strangers can be excluded only by a resolution of the House.[22]

The privilege of freedom of access to the sovereign is of very early origin. Peers, as hereditary counsellors of the Crown, enjoy an individual right of access at any time. The Commons on the other hand have only a collective right of access through the Speaker. Since 1541 this has always been claimed by the Speaker together with these privileges of freedom of arrest and debate.[23]

The right of settling the order of business in the respective

---

21 However, in spite of the prohibition, reports of debates frequently appeared. After the Revolution, Parliament made frequent attempts to restrain the publication of debates, and in 1738 characterized it as a "notorious breach of privilege" and resolved to deal sternly with offenders. However, the practice still continued, the reporters being careful to suppress the speakers' names, or to attribute their speeches to characters in Roman history. However, the publication of debates has been permitted in practice but in theory it is still a breach of privilege and liable to prosecution anytime: Idem. See also Wason v Walter (1868 - 1869) L.R. 4 Q.B. 73.

22 Fielden, op. cit., 110.

23 Idem.

Houses was settled early. The question arose under King Richard II, when the judges declared that this right did belong to Parliament.[24] The privilege also developed that the sovereign is bound to put the most favourable construction on everything done in Parliament, and can take notice of nothing pending in Parliament until a decision has been arrived at, and the matter brought officially to him.[25]

It is apparent from the demands for the various privileges referred to above that the conflict between monarch and Parliament revolved around the issue as to which of them should be politically supreme. The nature and scope of the Commons' powers and privileges were of paramount, if not critical, importance. Accordingly, the exclusive power to define and enforce their privileges themselves seemed the vital way of securing absolute supremacy.[26] The Commons were distrustful of the common law judges, due to the fact that in the Middle Ages the judges were appointed and dismissed by the King. Naturally, the judges had to be careful not to give decisions which would prejudice the

---

24 Ibid., 113.

25 Ibid., 110. However, it is said that:

> This exists as a matter of courtesy, and is essential as would be the case between ordinary business partners, to the harmonious co-operation of the Crown in its relation with the other members of the legislature.

A. B. Keith in Ridge, Constitutional Law of England (7th ed., 1939), 70. See also Erskine May, op. cit., 70.

26 Enid Campbell, Parliamentary Privilege in Australia (1966), 4.

interests of the monarch.[27]

From the very early times the significant question arose as to the authority of the ordinary courts to determine the nature and limits of parliamentary privileges. As early as 1604 in Benyon v Evelyn,[28] Sir Orlando Bridgman, Chief Justice of the Court of Common Pleas, maintained that if questions of parliamentary privilege did arise in the course of legal proceedings affecting the rights and duties of citizens, it was the court's duty to decide whether the claim of privilege was well founded. However, the Commons remained adamant and adhered to the view that parliamentary privileges should not be adjudicated elsewhere than in the House itself. Thus any judge who dared pronounce on question of privilege was likely to be summoned to the House for alleged contempt.[29] Accordingly in 1689 the House of Commons summoned two judges of the Court of King's Bench[30] to explain why judgement in the case of Jay v Topham[31] had gone against the Sergeant-At-Arms. The explanations were not acceptable to the House and the judges were forced to purge their contempt.[32]

After the Act of Settlement of 1700 the judges of the superior

---

27 Ibid., 5.Cf., Eliot's Case (1629) 3 St. Tr. 332.

28 (1664) Tr. 14 Car. 2, cited in Campbell, op. cit., 189.

29 Idem.

30 Sir Francis Pemberton and Sir Thomas Jones.

31 (1684) 12 St. Tr. 822.

32 Campbell, op. cit., 5. See also Ashby v White (1703) 2 Ld. Raym. 938; R v Paty (1704) 2 Ld. Raym 1105, cited in Campbell op. cit., 189.

courts in England were guaranteed security of tenure and were protected against summary dismissal by the Crown. However, while it secured the independence of the judiciary from the executive, it transferred control of the judges to Parliament. A judge could have been removed by address from both Houses to the Sovereign. Nevertheless, a few judges did embark upon the domain of privileges which the Houses of Parliament claimed to be exclusively their own.

Thus in R. v Paty,[33] as in Ashby v White,[34] the House of Commons attempted to prevent actions being brought by citizens to decide the question whether a free burgess of a corporation, who had an undoubted right to give his vote in the election of a burgess to serve in Parliament, and who had been refused and hindered from giving it by the officers, could bring an action on the case against such officers. The House of Commons committed the claimants to prison for contempt of the House. Holt, C. J. maintained that a writ of habeas corpus would go to release any one committed for contempt by the House of Commons, where the cause stated in the return was insufficient in law. The learned Chief Justice observed:[35]

> I will suppose, that the bringing such actions was declared by the House of Commons to be a breach of their privilege; but that declaration will not make that a breach of privilege that was not so before. But if they have any such privilege, they ought to shew precedents of it. The privileges of the House of Commons are well known, and are founded upon the law of the land, and are

---

33 Supra.

34 Supra.

35 (1704) 2 Ld. Raym. 1105, 1113.

> nothing but the law. As we all know they have no privileges in cases of breaches of the peace. And if they declare themselves to have privileges, which they have no legal claim to, the people of England will not be estopped by that declaration. This privilege of their concerns the liberty of the people in a high degree, by subjecting them to imprisonment for the infringement of them, which is what the people cannot be subjected to without an Act of Parliament. As to what was said, that the House of Commons are judges of their own privileges, he said, they were so, when it comes before them. And as to the instances cited, where the Judges have been cautious in giving any answer in Parliament in matters of privilege of Parliament; he said, the reason of that was, because the members know probably their own privileges better than the Judges. But when a matter of privilege comes in question in Westminster Hall, the Judges must determine it, as they did in Binyon's case. Suppose these actions against the constables of Aylesbury had gone on, and the defendants had pleaded this privilege; we must have determined, whether there were any such privilege or no. And we may as well determine it upon the return of this habeas corpus, for the defendants are here in a proper course of law, and the matter appears to us upon record as well this way, as if it were pleaded to an action ....
> And the Chief Justice said, if the votes of both Houses could not make a law, by parity of reason they could not declare law.

Although Holt C. J. was not able to convince his brother judges, he did convince posterity. His views of the law were expressly upheld and adopted by Lord Ellenborough in Burdett v Abbott[36] and by Lord Denman in The Sheriff of Middlesex Case.[37]

Hence, it was not until the nineteenth century that the authority of the courts was fully recognized. In the celebrated case

---

36 (1811) 14 East 1, 145.

37 (1840) 11 A. & E. 273, 289.

of Stockdale v Hansard[38] it was held that the law and custom of Parliament is part of the law of the land of which the ordinary courts of the land may take notice. Also it was said that neither of the Houses of Parliament had exclusive power to define their privileges. Their Lordships held that if such were the case, its effect would be that Parliament could alter the law by mere resolution. Thus Lord Denman C. J. said:[39] "the resolution of any one of the Houses of Parliament cannot alter the law, or place any one beyond its control".

The sequel to this case is well known. In The Sherriff of Middlesex Case,[40] it was held that if the House commits for contempt generally, without stating reasons, the court is unable to look behind the return; however, if the reasons are stated the courts will examine the validity of the detention.

The combined effect of the pronouncements in Ashby v White,[41] and R v Paty[42] and the decisions in Stockdale v Hansard[43] and The Sheriff of Middlesex[44] is that the courts deny to the Houses the right to determine the limits of their privileges, while allowing them within those limits exclusive jurisdiction. The

---

38 (1839) 9 A. & E. 1.

39 Ibid., 108.

40 Supra.

41 Supra.

42 Supra.

43 Supra.

44 Supra.

result is that the British Houses of Parliament may ignore judicial pronouncements on the scope of their privileges with impunity. However, it must be noted that neither of the Houses of the English Parliament have ever expressly renounced the view that their claim to be judges of their own privileges is a claim to judge both in regard to breaches of their undoubted privileges and the very existence and limits of those privileges themselves.

However, the apparent conflict of the jurisdiction of the courts and the Parliament in England may be left in the ashes of history. The decision in The Sheriff of Middlesex[45] seems to be the last occasion when the English House of Parliament and the courts came into conflict. In practice, Parliament seems to respect judicial rulings and accepts them as binding. Thus in 1958 the House of Commons took the unprecedented step of passing a resolution calling on the government to request the Judicial Committee of the Privy Council to advise on the interpretation of the Parliamentary Privilege Act 1770.[46] This, it is submitted, was an important step and event inasmuch as the House of Commons seems to have accepted or at least acquiesced in the doctrine that parliamentary privilege forms part of the law of the land and may be

---

45 Supra.

46 Re Parliamentary Privilege Act 1770 [1958] A.C. 331. This was done in pursuance of s. 4 of the Judicial Committee Act, 1833 whereby the British government is authorized to refer legal questions to the Committee for advice. See also Re Macmanaway and Re The House of Commons Clergy Disqualification Act, 1801 [1951] A.C. 161.

judicially determined.[47]

Hence in the United Kingdom some privileges of Parliament rest solely upon the law and custom of Parliament, while others have been defined by statute. All privileges are derived from one of these sources.[48]

C. The Basis of Privilege in Fiji

The basis of the privileges of the Fiji Parliament is the Fiji Constitution, but there is no provision determining these privileges. All that theConstitution provides is authority for Parliament to pass legislation on this subject-matter. Section 54 (3) states:

> Parliament may, for the purpose of the orderly and effective discharge of the business of the two Houses, make provision for the powers, privileges and immunities of those Houses and the committees and members thereof.

No legislation has been enacted under the Constitution, the position

---

47 Anson, op. cit., 154; Sir William Holdsworth, History of English Law, (First ed.) vol. X, 539; Beinart, loc. cit., 143; cf. Erskine May, op. cit., 174, where the learned author maintains that the conflict between the courts and the Houses of Parliament as to which is proper and final tribunal remains unresolved. However, he does admit that "since the House of Commons has not for a hundred years refused to submit its privilege to the decision of the courts, it may be said to have given practical recognition to the jurisdiction of the courts over the existence and extent of its privileges."

48 Anson, op. cit., 190. On the subject of the historical aspect of Parliamentary privilege in the United Kingdom, see Anson, op. cit., 153-199; Fieldon, op. cit., 103-161; Campbell, op. cit., 1 - 11, Generally, see Erskine May, op. cit., Chs. 3 to 9.

regarding the privileges of Parliament in Fiji remaining what it was before independence.

Prior to 1965[49] there was no legislation, order-in-council or provision in any of the Royal Instructions making provision for the privileges of "Parliament". The first time the Imperial Parliament conferred specific authority on the legislature of Fiji to enact legislation concerning the privileges of the legislature was in 1963. Section 55 of the Fiji Constitution Order 1963 provided:

> A law enacted under this Order may determine and regulate the privileges, immunities and powers of the Legislative Council and its members, but no such privileges, immunities or powers shall exceed those of the Commons House of Parliament of the United Kingdom of Great Britain and Northern Ireland or of the members thereof.

Before 1963 the Fiji legislature depended on the common law for its privileges. This was the position of colonial legislatures generally. In Fiji, it resulted from the passing of the Supreme Court Ordinance in 1875,[50] shortly after Fiji became a British

---

49 That is to the date of enactment of the Parliamentary Powers and Privileges Ordinance No. 26 of 1965.

50 39 Victoria C. 14, particularly ss. 26 and 28. Section 26 provides:

> The Common Law and Rules of Equity and the Statutes of general application which were in force in England ... on the second day of January 1875 shall be in force within the Colony subject to the provisions of section XXVIII of this Ordinance.

Section 28 provides:

> All Imperial Laws extended to the Colony by this or any future Ordinance shall be in force therein so far as the circumstances of the Colony and its inhabitants ... permits ....

Crown Colony on 10 October 1874. To put the matter in its proper perspective, it is intended to examine the position in Fiji as regards the privileges of Parliament at three stages: first, the common law position of colonial legislatures generally, secondly, the position of the Legislative Council in Fiji from 1963 [51] to 1970 and thirdly, the position of the Fiji Parliament under the present Constitution.

(1) The Position of The Colonial Legislatures Generally and Hence in Fiji, 1874 - 1963

The brief treatment of the historical development of parliamentary privileges in England showed that the basis is usage and custom, modified occasionally by statutory provisions. These are the sources of all privileges in England.

However, the legal position of colonial legislatures have been quite different and their privileges have a different basis. Although they closely resemble the English Parliament, legislative assemblies in the Colonies and self-governing states of the Commonwealth do not have any inherent constitutional right to the privileges belonging to the United Kingdom Parliament. They are entitled only to such privileges as are reasonably necessary for them to carry out their legislative functions.[52] This does not

---

51 Fiji was governed in terms of various Letters Patent until 1963, when the first Constitution Order was made. The second Constitution Order was made in 1966; and the third was the present Order which became effective on 10 October 1970.

52 Kielley v Carson (1842) 4 Moo. P.C. 63.

mean that colonial legislatures or self-governing states could not pass legislation conferring on themselves powers co-extensive with those of the United Kingdom Parliament. If the Imperial legislation conferring legislative powers were wide enough to include powers to pass such legislation, there would be nothing to stop colonial legislatures passing such legislation.[53] However, until this is done, the position is that as recognized in Kielley v Carson[54] decided shortly after the inception of the Judicial Committee established by the Judicial Committee Act, 1833.

The first decision of the Judicial Committee to settle the position of colonial legislatures was Kielley v Carson.[56] This

---

53 E.g., this was done in Australia by the legislature in Victoria in 1857 (20 Vic. No. 1 and see the Constitution Act Amendment Act, 1958, ss. 12 and 13); see also Dill v Murphy (1864) 1 Moo. P.C.N.S. 487.

54 Supra. However, the first case concerning the subject under consideration to come before the newly established Judicial Committee was Beaumont v Barnett (1836) 1 Moo. P.C. 59. However, this case was over-ruled by Kielley v Carson, supra.

55 It is not intended to survey the historical position of the colonial legislatures and the attitudes of the colonial legislatures and the Imperial Parliament prior to 1833 and before the American Revolution. Whatever views had been held regarding the American colonies (including Canada) prior to 1833 would be subject to the pronouncements and decisions of the Judicial Committee established in 1833. The position of colonial legislatures as at 1875 would be relevant to Fiji. However, for a comprehensive survey of the position of the Colonial legislatures regarding the American colonies and Canada, see Campbell, op. cit., 12 - 17.

56 Supra.

case laid down the principle that a colonial legislature is entitled only to such privileges as are reasonably necessary for the proper exercise of its functions and duties as a local legislature. The main question in issue was whether the House of Assembly of Newfoundland had the power to arrest and bring before it, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the House, with reference to the member's conduct as a member of the Assembly. The question was: did the House have the power possessed by both Houses of Parliament in England to adjudicate upon a complaint of contempt or breach of privilege?[57] It was held that a colonial legislature does not possess, as a legal incident, the power of arrest, with a view of adjudication, on a contempt committed out of the House.[58]

Thus Baron Parke, in delivering the opinion of the Judicial Committee, stated:[59]

> It is said, however, that this power belongs to the House of Commons in England; and this, it is contended,

---

57 It is interesting to note that the arguments before the Judicial Committee were presented twice. After the first argument was presented, implications and importance of the principles involved caused the case to be argued again before more members of the Judicial Committee; this was done.

58 However, it was expressly said that the question, whether the colonial legislature could commit by way of contempt in the face of it, did not arise and hence that question was left open: (1842) 4 Moo. P.C. 63, 84.

59 Ibid., 89.

> affords an authority for holding that it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the lex et consuetudo Parliamenti, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one.

Their Lordships did not accept such an analogy. They also stated:[60]

> Nor can the power be said to be incidental to the Legislative Assembly by analogy to the English Courts of Record which possess it. This Assembly is no Court of Record, nor has it any judicial functions whatever; and it is to be remarked that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.

Although the Judicial Committee is not committed strictly to its policy of stare decisis, it has never once gone back on its ruling and the principle laid down in Kielley v Carson. On the contrary, it has repeatedly confirmed the principle on various occasions.[61]

Thus the lex et consuetudo Parliamenti apply exclusively

---

60 Idem.

61 Fenton v Hampton (1858) 11 Moo. P.C. 347; Doyle v Falconer (1866) L.R. 1 P.C. 328; Barton v Taylor (1866) 11 App. Cas. 197. See also Toohey v Melville (1892) 13 L.R. (N.S.W.) 132, and Willis v Perry (1912) 13 C.L.R. 592.

to the Lords and Commons in the United Kingdom, and do not apply to the supreme legislature of a colony or dominion by reason of the introduction of the common law there.[62] In this respect there is no distinction between colonial legislative councils and assemblies whose powers were derived by grant from the Crown or created under the authority of an Act of the Imperial Parliament.[63] Furthermore, it does not matter if the alleged contempt was committed in the House or by a member. Even in such cases, (even though the contempt may be committed in the presence of the House and by its member,) the colonial legislature had no power to commit for contempt by analogy to lex et consuetudo Parliamenti.[64]

However, a colonial legislature did have such powers as were necessary for self-preservation and to remove any obstruction offered to its deliberations.

> It is necessary to distinguish between a power to punish for a contempt which is a judicial power, and a power to remove any obstructions offered to the deliberations or proper action of a legislative body during its sitting, which last power is necessary for self-preservation.[65]

Thus if a member behaved in a disorderly manner, he could have been removed from the Chamber, excluded temporarily or even expelled.[66]

---

62 Fenton v Hampton, supra.

63 Ibid.

64 Doyle v Falconer, supra.

65 Ibid., 340.

66 Idem.

> [B]ut there is a great difference between such powers and the judicial power of inflicting a penal sentence for the offence. The right to remove for self-security is one thing, the right to inflict punishment is another.[67]

Thus the Speaker or Chairman of committees of a legislative assembly had power, without a resolution of the House, to eject from the chamber a member guilty of disorderly conduct and wilful obstruction and interruption of the business of Parliament.[68] But the Assembly could not remove a member on the ground of contempt when he was not actually obstructing business, but merely refusing to make an apology in terms dictated by the Assembly for an ill-founded accusation.[69] Further, since the colonial legislature had only protective and self-defensive powers, and no punitive powers, it has been held by the High Court of Australia that the Speaker of New South Wales had no authority to cause a member who had been disorderly in the Chamber, and had left it in a disorderly manner, to be arrested outside the Chamber and brought back into it.[70] In the same case an allegation that the Speaker reasonably believed the bringing back of the member was necessary to prevent further disorder in the Chamber was held irrelevant.

---

67 Idem.

68 Toohey v Melville (1892) 13 L.R. (N.S.W.) 132.

69 Landers v Woodworth (1878) 2 S.C.R. 158. In this case The Supreme Court of Canada dissented from several earlier decisions of cases in Quebec. In this case the Assembly of Nova Scotia was involved and the accusation was against the Provincial Secretary.

70 Willis v Perry (1912) 13 C.L.R. 592.

The powers incidental to or inherent in a colonial legislature were such as were necessary to the existence of such a body and the proper exercise of its functions. They did not justify punitive action or unconditional suspension of a member during the pleasure of the legislature.[71]

It is submitted that what has been stated described the position in Fiji. The principles discussed above applied to Fiji inasmuch as the Privy Council decisions applied to Fiji and the decisions of other colonial courts were in fact applications of the principles pronounced and applied by the Judicial Committee.

(2) The Position of the Legislature in Fiji, 1963 to 1970

Theoretically, the Fiji Legislative Council could have passed legislation regarding its privileges at any time up to 9 October 1970.[72] This could have been done under its general legislative power to enact legislation for the "peace, order and good government of Fiji". Any such legislation would have been subject to the proviso that it was not repugnant to the laws of England.[73] It could not have provided for privileges or powers exceeding those of the Parliament of Westminster.

The Fiji Constitution Order 1963[74] expressly authorised the Fiji Legislative Council to enact laws regarding its powers,

---

71 Barton v Taylor (1866) 11 App. Cas. 197.

72 Fiji secured independence on 10 October 1970.

73 Colonial Laws Validity Act 1865, s. 5.

74 See p. 288, ante.

privileges and immunities provided they did not exceed those of the House of Commons of United Kingdom. As a result, the Fiji Legislative Council enacted the Parliamentary Powers and Privileges Ordinance in 1965.[75] This Ordinance provided for various accepted privileges of Parliament, namely;

(a) Immunity from legal proceedings in respect of words spoken in the Council, (later amended to read "Parliament"),[76] that is freedom of speech inside Parliament.

(b) Freedom from arrest for members [77] and immunity from service of process.[78]

(c) Expulsion of strangers from the Council (Parliament) or the precincts thereof.[79]

(d) Immunity of members from giving evidence of proceedings in Parliament without leave of the House.[80]

There are provisions for various other matters appertaining to the proper conduct of the business of the House and for the protection of the members of the House.[81] Some of these provisions

---

75 No. 26 of 1965. This Ordinance is still in force.

76 Ibid., s. 3.

77 Ibid., s. 4.

78 Ibid., s. 4.

79 Ibid., ss. 6 and 8.

80 Ibid., s. 16. However, as to the validity of this provision since the enactment of the Constitution, see pp. 265 et seq., ante.

81 Ibid., 22. 19 and 20.

are the equivalent of those concerning contempt of Parliament under the English parliamentary law.[82]

This Ordinance, it is submitted, is a codification of the privileges, immunities and powers of the English House of Commons. It is clear that a selection has been made of such privileges, immunities and powers of the House of Commons as were reasonably suited and convenient for adoption by the Fiji legislature, taking into account the local conditions. The provisions constitute a reasonable representation of the essential powers and privileges for the efficient functioning of the Legislative Council and virtually incorporate the essential and basic privileges, immunities and powers in the House of Commons. Part II of the Ordinance contains and incorporates the fundamental privileges and immunities of the legislature and of the members and they are comparable to the like privileges of the House of Commons.[83]

Part III of the Ordinance similarly contains and incorporates provisions relating to questions of evidence and enables the legislature to provide for the attendance of persons before the House and for the production of documents. These, again, are similar to those relating to the House of Commons.[84]

Part IV of the Ordinance makes provision for offences and

---

82 E.g., disobeying any order of the House for attendance or for production of documents; ibid., s. 20 (a).

83 See nn. 76 to 81, p. 296, ante.

84 See Erskine May, op. cit., 666-675.

penalties. All of the offences constituted in this part are in fact breaches of privileges of the House of Commons.[85] However, there are a number of offences mentioned under this Ordinance which were already offences if committed against any member of the public.[86] It may seem redundant but perhaps they have been included to draw specific attention to them as constituting offences against the privileges of the House or any of its members.

Part V of the Ordinance contains miscellaneous provisions; and here too are provisions corresponding to privileges, immunities and powers of the English House of Commons. Thus it is an offence to print any false copy of any ordinance or of any report, paper, minutes, or votes of proceedings of the House of Parliament.[87] There is also provision affording protection to persons responsible for publications authorised by the legislature, and protection in civil proceedings in respect of the publication of the proceedings of the House, provided that such publication has been made in good faith and without malice.[88]

The outstanding feature of the provision relating to privileges of Parliament is that relating to breaches of privilege. It has been seen that in the United Kingdom there has been major

---

85 Ibid., Ch X.

86 E.g., to assault any member coming to, being within, or going from the precincts of Parliament. Assault was already an offence under the Penal Code; s. 276.

87 Parliamentary Powers and Privileges Ordinance, s. 25.

88 Ibid., ss. 26 and 27.

conflict between the House of Commons and the courts as to whether the jurisdiction of one supersedes the other. The series of cases which culminated in Stockdale v Hansard [89] and The Sheriff of Middlesex [90] created uncertainty. Under the principles there stated, the courts deny to the Houses of Parliament the right to determine the limits of their privileges, while allowing them within the limits of established principles exclusive jurisdiction. However, neither House has ever expressly renounced its claim to be judge of its own privileges meaning thereby the determination both of breaches of its undoubted privileges and of the existence and limits of those privileges. [91]

In the United Kingdom, the House of Commons, subject to the principle adopted in Stockdale v Hansard [92] and The Sheriff of Middlesex, [93] is the sole guardian of its own privileges and the House claims to be the sole judge of any matter that may arise which in any way infringes those privileges. Once a breach of privilege is established, it will punish whom it considers to be guilty of a breach of privilege or of a contempt of the House.

However, it is clear from the Ordinance in question that the legislature in Fiji has voluntarily divested itself of the power of

---

89 (1839) 9 A. & E. 1.

90 (1840) 11 A. & E. 273.

91 See n. 47, p. 287, ante.

92 Supra.

93 Supra.

judging what is and what is not a contempt and/or breach of its privileges. It has invested the courts with the power of judging and punishing offenders.[94] This is a very significant and profound constitutional change from the position existing in the United Kingdom.

In Fiji no punitive powers have been bestowed on Parliament, nor did they exist in common law, as has been seen. At most the Houses of Parliament in Fiji may remove strangers[95] and/or suspended members,[96] and/or persons behaving in such a manner as to hinder or obstruct the proceedings in the House. The House may also possibly expel a member, or take such measures as are reasonably necessary for the proper exercise of its functions and duties as a local legislature.[97] But it certainly cannot take punitive action or punish for contempt as such.[98] This is left to the courts and there are specific offences created in respect of most of what are breaches of parliamentary privileges. It is interesting to note that the Houses may have a

---

94 Except perhaps to a limited extent mentioned below. See p. 309, post.

95 Parliamentary Powers and Privileges Ordinance, s. 8.

96 Ibid., s. 9.

97 See pp. 289 et seq., ante.

98 Cf. Madhavan v Falvey (unreported) Civil Appeal No. 34 of 1973 (Fiji Court of Appeal). In this case there is an obiter dictum of the Fiji Court of Appeal that "the power in the Fiji Parliament to punish for contempt" was one of "those established privileges of the House itself". It is submitted, with respect, that this dictum is wrong. The authorities, particularly of the Privy Council, show the contrary. See e.g., Kielley v Carson (1842) 4 Moo. P.C. 63 and pp. 289 et seq., ante.

warrant issued and if needs be, have a person arrested to secure his attendance before the House. However, if he persists in refusing to answer questions, without lawful excuse, the House in question has no other power to deal with such "offenders" other than to have him prosecuted before a court of law. Such a person would have committed an offence under section 20 (b) of the Ordinance. The important point is that the House itself is powerless to deal with such persons. Ultimately it is for the courts to punish. Such a power does not exist in the legislature even at common law.[99]

It is submitted that it is a fortunate state of affairs that the Fiji Parliament has no power to punish for contempt and that those guilty of actions tantamount to contempt may be dealt with by a court of law should such actions fall within the offences created by the 1965 Ordinance. The present position of the United Kingdom Parliament[1] with regard to the matters that constitute contempt of Parliament and the procedures adopted to determine whether or not a person is in contempt, leaves much to be desired.

Contempt of Parliament has been generally stated as[2]

> any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member of officer of

---

99 See pp. 289 et seq., ante.

1 For that matter all Commonwealth Parliaments having the power to punish for contempt.

2 Erskine May, op. cit., 132.

> such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results ... even though there is no precedent of the offence.

There is no limitation on the power of the English Parliament to determine that in a particular case certain conduct constitutes contempt. Parliament is the judge of what is and what is not contempt, and the courts are virtually powerless to interfere. Thus if the warrant issued by the Speaker is in general terms, that is, if it simply says that the person named in it has been found in contempt of Parliament, the courts cannot intervene.[3]

A person can, theoretically be found guilty of contempt without being given any opportunity to be heard on the matter. This can be demonstrated by Cahill's case.[4] A member of the Legislative Assembly of Victoria, who was the Chairman of a Standing Committee, sought from one Cahill certain information. This was refused and the member raised a question of privilege in the Assembly within an hour of the refusal. Cahill, before the matter came to be debated in the Assembly, supplied the information and explained his conduct by a letter to the member concerned. As a result the member moved an amendment to his motion:[5]

> That the refusal ... to provide the information ... sought

---

3 See however the combined effect of Stockdale v Hansard, supra, and The Sheriff of Middlesex supra, discussed at pp. 284 et seq., ante. See also The Queen v Richards; Exparte Fitzpatrick and Browne (1955) 92 C.L.R. 157.

4 D.C. Pearce, "Contempt of Parliament-Instrument of Politics or Law?" (1968) 3 F.L. Rev. 241, 243. The facts of the case are those stated in the article.

5 A motion of this kind is not unusual. See Erskine May, op. cit., 164.

> ... constitutes a contempt of this House of Parliament but, having regard to the prompt supply of the [information] and to the letter tendered ... this House now feels there may have been some misunderstanding and will now proceed to the consideration of the Orders of the Day.

This motion was carried. This still found Cahill guilty of contempt although he had not been called upon to make any explanation. The fact that no penalty was imposed is irrelevant. The whole concept of natural justice is offended by a finding that a person has committed an offence without being given an opportunity of defending himself. Thus in the contempt proceedings before Parliament, there are no legal guarantees that the person charged will be given a proper hearing. Proceedings in Parliament are political in nature. To expect a political body suddenly to drop its normal approach and to adjudicate upon some matter with the impartiality of a court is asking the impossible. The basic factors are that the Parliament, in such contempt proceedings, is the complainant, the prosecutor and the judge. This infringes the very basic requirements of natural justice. Moreover, politicians are not all legally trained adjudicators. Certainly, in such questions, they could be politically motivated and could also vote on party lines. The question must be posed: should proceedings for contempt be tried by agencies and in accordance with principles of the law or of politics? [6]

Another glaring example of the injustice that may occur is

---

6 E.g., the case in 1968 of the Premier of the Victorian Legislative Assembly, Sir Henry Bolte. See (1968) 3 F.L. Rev. 241, 246. In this case the Leader of the Opposition alleged that the Premier was guilty of contempt for remarks allegedly made over the radio by the Premier. The voting was on party lines; ibid., 248.

Klaebe's case.[7] The South Australian Parliament referred a Bill to prohibit scientology to a select committee, the chairman of which was Hill. The select committee heard evidence from the members of the public. Among them was Klaebe. The latter had asked for an assurance from the committee that he would be granted an unbiased hearing and that the evidence tendered by him would be examined in a completely impartial manner. The minutes disclosed that this assurance was given and accepted by Klaebe.[8] Klaebe had, however, written a letter to the Secretary of the committee which reflected upon the conduct of the Chairman. The substance of the letter was that he believed that Hill was[9]

> unduly biased against Scientology [and] I must formally charge him with that short-coming .... In doing so I restate the allegations I made in my evidence which I may point out the Honourable Gentleman was not prepared to deny.

Klaebe was brought to the Bar of the House on the appointed day to answer questions. He acknowledged that he had signed the letter and then he was asked to withdraw. He was recalled and asked by the President whether he wished to offer an apology at that stage. He replied that he was not sure for what he should apologise. He said that all he could say was that he had signed the letter and it was his intention to send it. He was again asked to withdraw. It was resolved that the writing and sending of the

---

7 Pearce, loc. cit., 248. The facts of the case are those stated in the article

8 1968 Parl. Deb. (S.A.) 2160 - 2161.

9 Idem.

letter was highly improper conduct and, without proceeding to the question of whether that constituted contempt, that Klaebe should be warned to refrain from a repetition of such conduct in the future. The President gave the warning to Klaebe and the latter withdrew.

There are various unfortunate features to this case. Klaebe was not given an opportunity to offer anything by way of explanation of the letter or in justification of the matter referred to in the letter. All that he was offered was an opportunity to apologise for his statements in the letter. Theoretically, the Council could have passed a motion finding Klaebe guilty of contempt.

It is difficult to see how else it would have been possible for Klaebe to have raised the question of whether or not a member of the select committee was biased. It would seem to be a person's democratic right to assert that a parliamentary committee was not conducting its enquiry impartially. Surely it was in the public interest that such an assertion be made. One would have thought that Parliament would be prepared to receive, and indeed enquire into, an allegation of this type rather than to silence the maker of the complaint by a threat of use of its punitive powers.[10] If such an allegation is justified, surely it would be in the public interest for it to be made.

The two cases mentioned show clearly the short-comings of contempt proceedings in Parliament. At least, they show that the proceedings do not measure up to the usual basic standards expected of a body exercising penal jurisdiction. The cases also

---

10 Pearce, loc, cit., 251.

give some insight into the very great power that the right to punish for contempt gives to a Parliament.

The Select Committee on Parliamentary Privilege in the United Kingdom investigated the subject and made a report to Parliament in 1967.[11] The main criticisms levelled against parliamentary jurisdiction to punish contempts enumerated by the Committee were:

(a) The scope of Parliament's penal jurisdiction is too wide and too uncertain; the press and the public are wrongly inhibited from legitimate criticism of parliamentary institutions and members' conduct by fear that the penal jurisdiction may be invoked against them.[12]

In relation to this criticism the committee said:[13]

> Your Committee accept that the uncertainty which clouds the exercise of the penal jurisdiction of the House may play some part in inhibiting legitimate criticism of the way in which the House works and of the conduct of its members. Your Committee have no doubt that these matters should not be immune from criticism. They accept the principle that a legislature which is isolated from informed and accurate criticism from outside cannot hope to recognise and to remedy all its own defects.

The Committee felt that some of the fears expressed were exaggerated and that the House had exercised its penal jurisdiction

---

11 Report from the Select Committee on Parliamentary Privilege H.C. 34 of 1967 - 68.

12 Ibid., para. 10.

13 Ibid., para. 17

sparingly. However, it did concede that the uncertainty in the minds of many people as to precisely what constituted contempt of Parliament served to perpetuate the fear that Parliament might exercise its jurisdiction more widely than was justified. Klaebe's case illustrates the uncertainty of a person when dealing with parliamentary proceedings. It is not clear when some comment or remark will be treated as constituting contempt. It will depend on the attitude of individual members of Parliament and perhaps the attitude of the party to which they belong.

(b) Some members are too sensitive to criticism and invoke too readily the penal jurisdiction of the House; they do so not merely in respect of matters which are too trivial to be worthy of that jurisdiction, but also on occasions when other remedies are available to them as citizens, for instance by court action.[14]

The Committee conceded this to be a justifiable criticism. Instances referred to by the Committee showed that many matters raised by members were found not worthy of pursuing by summoning the persons concerned before the Bar of the House. Here too Klaebe would be a good illustration, and perhaps Cahill's case also. In the latter case there were obviously other channels open to the chairman to secure the information.[15]

(c) The procedure for invoking the penal jurisdiction encourages

---

14 Ibid., para. 10.

15 E.g., it was open to the chairman to ask the Premier, as head of Cahill's department, to arrange for the delivery of the document.

its use for the purposes of publicity, is inequitable to persons whose conduct is under scrutiny, and fails to accord with the ordinary principles of natural justice.[16]

The validity of this criticism was conceded by the Committee which was satisfied that the procedure did not ensure for the person "charged" a hearing that complied with the basic principles of natural justice - the right to know the charge against him, the right to present his side of the case, the right to be present at the hearing and to be represented by counsel, and the right to cross-examine witnesses.[17]

(d) There is too much uncertainty about the defences which may legitimately be raised by those who are subjected to the penal jurisdiction; in particular it is a matter of doubt whether a person who has made truthful criticisms should be allowed to testify to their truth.[18]

(e) It is contrary to principle that Parliament should be both prosecutor and judge.

These criticisms and the specific cases referred to above demonstrate the undesirable situations and the areas of uncertainty that may arise in countries where Parliament has unspecified power to punish for contempt. Despite assertions that Parliament would exercise its penal jurisdiction sparingly and

---

16 Report, para. 10.

17 E.g., Cahill's Case.

18 Report, para. 10.

only when it is satisfied that to do so is essential in order to provide reasonable protection for each House, its members or its officers from such improper obstruction, or attempt at, or threat of, obstruction as causing, or as liable to cause substantital interference with the performance of their respective functions,[19] the potential dangers remain. Uncertainties remain. Parliament may still arbitrarily declare that which was lawful when done to be unlawful.[20] It is not sufficient to say that members of Parliament represent the people and would not abuse their power. The actions of Parliament may have popular support and still constitute a travesty of justice. It is fundamental to the rule of law that a person ought to be found guilty of a breach of the established law and sentenced to the prescribed penalty for that breach. However, as the rules pertaining to contempt proceedings stand in the United Kingdom, there is arbitrariness as to offence, trial and penalty.

All of these difficulties, uncertainties and criticisms do not apply to Fiji. As has been seen, in Fiji the actions constituting contempt have been specified as specific offences with prescribed penalties. Jurisdiction to try breaches of the laws is obviously vested in the courts, where an alleged "offender" will have full rights to put in his defence and present his case in accordance with natural justice.

It has been stated that it is proper and consistent with Parlia-

---

19 Cf. Report, para. 15.

20 Cf. the position in Queensland, Tasmania, Western Australia and Northern Territory where there is specific legislation prescribing conduct for which the legislature may punish a person: Pearce, loc. cit., 258.

ment's dignity as the highest authority in the land that it should handle the punishment of contempt or breach of privilege.[21] It is submitted that the dignity of Parliament does not justify an arbitrary determination of what conduct constitutes contempt nor does it justify failure to give a person charged the benefit of the basic principles of natural justice. Courts are accustomed to view all matters with impartiality whereas a Parliament is not, inasmuch as the members have varied and politically motivated views and may be influenced by matters alien to impartiality.

Thus in Fiji, since the courts are invested with the power to deal with questions of contempt of Parliament, many advantages are gained. Some of the more obvious are:

(a) It avoids the use of contempt procedure for political purposes.

(b) It deters hasty allegations of the commission of contempt.

(c) It assures those charged of the protection of the principles of natural justice.

(d) There is greater certainty. Accordingly, the press and the public are not unduly inhibited from legitimate criticism of parliamentary institutions and the conduct of parliamentarians. They know in advance what conduct is prohibited and accordingly they are in a position to keep their criticisms within the boundaries allowed by law.

(e) Perhaps the most important advantage is that in Fiji it cannot be said, as it is of Parliament in the United Kingdom, that it is both prosecutor and judge.

---

21 Odgers, Australian Senate Practice (3rd ed., 1967), 463.

It is of interest to note that in the application of the contempt provisions the Fiji Ordinance relating to parliamentary privileges makes no distinction between members of Parliament and other persons. Parliamentarians are as much subject to prosecution in the courts for a breach of the Ordinance as are other persons. This is a commendable position in that it avoids any doubts or misunderstanding that members of Parliament might be a class completely above the law or superior to other citizens. Parliament, unlike most other organizations, has not retained the power to discipline its own members.

The complete transfer of Parliament's penal jurisdiction to the courts does mean that members of Parliament in Fiji are less likely to be subjected to actions for "political" contempts. But frivolous and vexatious prosecutions for contempt are obviated by the fact that no prosecutions for an offence under the Ordinance can be instituted without the written authority of the Attorney-General and the consent of the Speaker of the House of Representatives or the President of the Senate as the case may be.[22]

It is submitted that the Fiji Ordinance balances the interests of the citizen, the public and the press with those of the House, its members and officers. It relates the role of parliamentary privilege to the basic requirements of a modern legislature.[23]

---

22 Parliamentary Powers and Privileges Ordinance, s. 32.

23 This was also the basis of the approach taken by the Select Committee of the House of Commons on Parliamentary Privilege in 1967: Report para. 11.

It determines and provides reasonable limits of protection, power and immunity essential for Parliament to fulfil its proper functions. For members, there is full freedom of speech inside Parliament,[24] freedom from arrest, and other specified protections.[25] For the respective Houses of Parliament, there is power to expel strangers,[26] to exclude a suspended member,[27] to order[28] and compel attendance of witnesses,[29] and there are other specified safeguards.[30] On the other hand, protection is afforded to the citizen summoned to appear before the House to give evidence.[31] Persons responsible for publications authorized by either House[32] and those who publish without malice proceedings in Parliament are given protection.[33]

(3) The Position of the Legislature in Fiji since 1970[34]

Under the Constitution, the Parliament of Fiji has express legislative authority to enact legislation defining the powers,

---

24 Parliamentary Powers and Privileges Ordinance, s. 3.

25 Ibid., s. 20.

26 Ibid., ss. 8 and 19.

27 Ibid., s. 9.

28 Ibid., s. 10.

29 Ibid., s. 12.

30 Ibid., ss. 18, 20, 21, 22, 25, 26 and 27.

31 Ibid., ss. 14, 15 and 17.

32 Ibid., s. 26.

33 Ibid., s. 27.

34 The Independence Constitution came into effect on 10 October 1970.

privileges and immunities of the Houses of Parliament and the committees and members thereof.[35] Because the Fiji Parliament, since 1970, has not enacted any such legislation, the 1965 Ordinance remains in force by virtue of the Fiji Independence Order 1970[36] and what has been said in the preceding section continues to apply.

The Parliament of Fiji, may, by ordinary legislation, repeal and re-enact the 1965 Ordinance or vary it. There is one limitation on the powers of Parliament. It cannot, by a statute passed in the ordinary way, invest itself with the penal power to punish for contempt.[37] Section 52 of the Constitution, which as we have seen gives general powers to the Fiji Parliament to make laws, commences with the phrase "Subject to the provisions of the Constitution". Section 54, which provides the specific power for Parliament to regulate the procedure in each House and their powers, privileges and immunities, also commences with a similar phrase, namely, "Subject to the provisions of this Constitution". It has already been seen[38] that Parliament in Fiji cannot pass any legislation in contravention of the provisions of the Constitution. Under section 5 (1) of the Constitution

---

35 S. 54 (3).

36 Ss. 2 and 5 of the Order. Also see Ch.XI pp. 452 et seq., post.

37 It can be done, as will be presently seen, but only after there has been an amendment to other provisions of the Constitution.

38 Pp. 210 et seq., ante.

it is provided that:

> No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say ....

Then follow the specified cases contained in paragraphs (a) to (j) inclusive.[39] There are specific provisions made for contempt of court or other tribunal[40] where an order of the court is required. But there are no provisions relating to contempt of Parliament under section 5 of the Constitution. It is submitted that section 5 (1) being very specific, imposes a total prohibition of deprivation of personal liberty except in accordance with that section.

The powers given by sections 52 and 54 of the Constitution are themselves subject to the provisions of the Constitution. The

---

39 The substance of the respective paragraphs are as follows:

(a) relates to criminal law matters and conviction in respect of a criminal offence.

(b) relates to an order of a court punishing for contempt of court or other tribunal.

(c) relates to execution of an order of a court made to secure the fulfilment of a legal obligation.

(d) relates to bringing of a person before a court in execution of the order of a court.

(e) relates to suspicion of a person having committed, or being about to commit, a criminal offence.

(f) relates to an order of a court in relation to young person.

(g) relates to the prevention of diseases.

(h) relates to persons of unsound mind, addicts or vagrants, their treatment and protection of the community.

(i) relates to unlawful entry into Fiji and expulsion.

(j) relates to the movement of persons in Fiji.

40 Constitution, s. 5 (1) (b).

powers and privileges of the Parliament in Fiji cannot be asserted in contravention of the fundamental rights guaranteed, inter alia, by section 5.[41] In any event, it has already been seen that the penal power to punish for contempt was not possessed by the Fiji legislature even prior to 1970.[42] Moreover, section 5 is an entrenched provision in terms of section 67 of the Constitution. Accordingly, for the Fiji Parliament to invest itself with the penal powers to punish for contempt, it must amend section 5 of the Constitution by following the special procedure laid down in section 67[43] and include the powers to punish for contempt among the exceptions enumerated in section 5. Thereafter it could pass whatever legislation it requires acting by simple majority under section 54 of the Constitution. Until this has been done, it is submitted, the Fiji Parliament has no power to pass legislation to punish for contempt of itself. If this amendment is not made, any person committed for contempt of the Parliament in Fiji is entitled to make application to the Supreme Court under section 17 of the Constitution on the ground that he has been deprived of his personal liberty in contravention of section 5 (1) of the Constitution. The principle applicable in England that a general warrant issued by the Parliament is not questionable by a court

---

41 See also D.D. Basu, Commentary on the Constitution of India (5th ed., 1965) vol. II, 277 citing Sharma v Krishna Sinha, A. 1959 S.C. 395 and Ref. Under Art. 143 of the Constitution. A. 1965 S.C. 745, 786.

42 Pp. 289 et seq., ante.

43 See pp. 206 et seq., ante.

of law is not applicable in Fiji in view of the express provisions of the Constitution discussed above.

CHAPTER IX

THE CONSTITUTION AND INTERPRETATION

A. General Principles and the Need for Differentiation

The Constitution or more accurately the written Constitution in Fiji has a very short history.[1] The fundamental mechanism of government in Fiji and the relationship between government and citizen and between citizens are all enshrined in the Constitution. The Constitution is essentially a written body of rules; the courts have been assigned the duty of determining the precise meaning and scope of these rules whenever there is a question of doubt. Although the courts are bound by the express terms of the document, they have a very wide latitude in the application and interpretation of it. They may place a wide construction on one provision and a narrow one on another; they may give particular emphasis to one provision and less to another. Hence the courts are able to effect considerable change in the working of the Constitution without formally modifying its provisions. As the guardian of the Constitution, the courts in Fiji will play a very positive role in the development of the legal order. This will become more obvious as they exercise their function of interpreting the Constitution. Bishop Hoadley had aptly observed:[2]

> Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them.

The 1970 Constitution of Fiji, like the Constitutions of many

---

1 The first written Constitution was granted in 1966 and was superseded by the 1970 Independence Constitution.

2 Cited in J. C. Gray, The Nature and Sources of the Law (2nd ed., 1931), 102.

former British territories, takes the form of an Order in Council under the Fiji Independence Act, 1970, an Act of the United Kingdom Parliament.[3] Hence a question of major consequence arises: in interpreting the provisions of the Constitution, must the courts apply the ordinary rules of statutory interpretation as they would apply to any Act of Parliament or is the Constitution to be placed on a different plane?

Judicial pronouncements on the application of the principles of interpretation to written constitutions have oscillated between two views. The first view is that a written constitution should be interpreted in the same manner as any other statute, namely, by reference to its terms and to them alone. Thus in 1878 Lord Selborne, delivering the opinion of the Judicial Committee and addressing himself to the question of whether particular legislation exceeded the power granted, said:[4]

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited ... it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

Similarly in 1912 Lord Loreburn L.C., delivering the opinion

---

3 The 1970 Constitution of Fiji is a schedule to the Fiji Independence Order 1970.

4 R. v Burah (1878) 3 A.C. 889, 904.

of the Judicial Committee, stated:[5]

> In the interpretation of a completely self-governing Constitution founded upon a written organic instrument ... if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous ... recourse must be had to the context and scheme of the Act.

Such an approach has also been taken in relation to the Constitution of Australia.[6] In the same context it has been held that a judicial tribunal has no concern with the policy of any Act which it may be called upon to interpret.[7] Thus Viscount Simon L.C. delivering the opinion of the Judicial Committee, stated:[8]

> [I]n construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used.

The second view is that the principles pertaining to constitutional interpretation must be different from those of ordinary enactment. This view has been put succinctly by Higgins, J.:[9]

---

5 Attorney-General for Ontario v Attorney-General for Canada [1912] A.C. 571, 593. (Emphasis added).

6 Webb v Outrim [1907] A.C. 81; Attorney-General v Colonial Sugar Refining Co. Ltd [1914] A.C. 237. See also W.A. Wynes, Legislative, Executive and Judicial Powers in Australia (4th ed., 1970), 8.

7 Vacher and Sons Ltd v London Society of Compositors [1913] A.C. 107, 118.

8 King Emperor v Benoari Lal Sarma [1945] A.C. 14, 28.

9 Attorney-General for New South Wales v Brewery Employees' Union (1908) 6 C.L.R. 469, 611, (original emphasis).

> [A]lthough we are to interpret the words of the Constitution on the same principles of interpretation as we apply to any ordinary law, these very principles of interpretation compel us to take into account the nature and scope of the Act that we are interpreting - to remember that it is a Constitution, a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be.

Similarly in Northern Ireland the distinction between constitutional and other statutes was expressly acknowledged by the highest judicial body when it was stated that:[10]

> A flexibility of construction is admissible in regard to [constitutional statutes] which might be rejected in construing ordinary statutes or inter partes documents.

It is submitted that as far as Fiji is concerned the second view is to be preferred and ought to be adhered to. No doubt it is to be expected that judges trained in the common law and accustomed to orthodox canons of statutory interpretation would approach the Fiji Constitution, which is part of a United Kingdom statutory instrument, as an ordinary statute. But it must be borne in mind that there are differences of function and character between constitutional and other enactments. The special character and status of the Constitution must be given due recognition in its interpretation. In Fiji, as in most other countries, the constitutional instrument is the very foundation of all powers - be they legislative, executive or judicial. The whole constitutional structure of the country depends on the Constitution. This

---

10 Belfast Corporation v O.D. Cars Ltd [1960] N.I. 60, 86, per Viscount Simonds.

fact must be borne in mind when it is interpreted.

A constitutional document does not contain all the minute details that are normally provided in statutes. It cannot be regarded as " a political strait-jacket for the generations to come" [11] or as "though it were a mathematical abstraction, an absolute having no relation to the lives of men". [12] Its provisions are obviously couched in broad and general terms. As Frankfurter J., stated: [13]

> From generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not forsee them .... The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being.

Similarly O'Connor J., observed: [14]

> [I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

Accordingly, the broad and general terms of a Constitution must

---

11 Schneiberman v United States 320 U.S. 118, 137 (1942), per Justice Murphy.

12 Martin v Struthers 319 U.S. 141, 152 (1942), per Justice Frankfurter.

13 Idem. See also British Coal Corporation v The King [1935] A.C. 500, 518, per Viscount Sankey L.C.; Bain Peanut Co. of Texas v Pinson 282 U.S. 499, (1931); Edwards v Attorney-General for Canada [1930] A.C. 124, 136 per Lord Sankey, L.C.

14 Jumbunna Coal Mine No Liability v The Victorian Coal Miners' Association (1908) 6 C.L.R. 309, 367.

be given broad and general interpretation. So the interpretation of the terms in a Constitution must be distinguished from the interpretation of ordinary statutes. Thus in R. v Public Vehicles Appeal Tribunal,[15] the High Court of Australia stated:

> We must ... remember that it is a Constitution we are construing and it should be construed with all the generality which the words used admit.

B. Interpretation of the Constitution in Practice

The Fiji Constitution is contained in a statutory instrument. Because the British Constitution is unwritten, the common law does not contain authorities of direct relevance and application to the constitutional problems that may arise in Fiji. Nor did Fiji experience the gradual constitutional development from limited self government to independence that was common to most dependent British territories. In many cases this was hastened by a strong nationalist sentiment. Fiji proceeded from a Crown Colony with very limited representative government to a much enlarged measure of representative government in 1966 and suddenly to responsible government and independence in 1970. Independence was achieved suddenly despite the fact that a significant and decisive section of the people of Fiji had consistently and strenuously opposed it.[16] Hence Fiji has had very modest experience of the operation of a written constitution.[17]

---

15 (1964) 113 C.L.R. 207, 225.

16 See pp. 83 et seq., ante.

17 It is only from 1966 that the first written Constitution with provisions of legislative and executive limitations and fundamental rights operated in Fiji.

The courts in Fiji must of necessity draw upon the experience and knowledge of other jurisdictions and adapt a comparative approach to questions of constitutional interpretation. Such an approach was approved by the highest judicial tribunal in Northern Ireland, when Viscount Simonds stated:[18]

> It is right ... that in the interpretation of constitutional instruments guidance should be sought from those courts whose constant duty it has been to construe similar instruments.

His Lordship also stated:[19]

> The courts of Northern Ireland have not hesitated to adopt this course and have found assistance in their task of construing their own constitution from the manner in which great judges among the English-speaking peoples overseas have dealt with kindred problems.

This approach should, however, be used with caution; there are possible shortcomings and limitations of which the courts in Fiji must be conscious. In relation to the fundamental rights incorporated in a written constitution framed along American lines, there is a danger that judges searching for judicial precedents to aid the interpretation of abstract phrases might rely too heavily on American decisions. Those decisions may be entirely suitable and achieve acceptable social and economic adjustments in the United States, but may not be appropriate in Fiji.

---

18 Belfast Corporation v O.D. Cars Ltd [1960] N.I. 60, 86.

19 Idem. See also Harry Calvert, Constitutional Law in Northern Ireland (1968), 122 - 124.

It must not be forgotten that societies differ in character. Also the political function which a particular constitutional formula may discharge in one state will not necessarily be suitable for another state, even though the formula may be couched in identical or substantially similar terms.

Consideration of certain specific principles and doctrines of constitutional interpretation may show that analogies are dangerous and that reliance on foreign authorities is misplaced; on the other hand, certain principles and doctrines applied in other jurisdictions may be of invaluable assistance to Fiji. Principles and doctrines of constitutional interpretation are many and varied. Consideration of all of them would be out of place in this work but a few may be considered as representative of the two views of constitutional interpretations and provide guidance as to the stand to be taken in Fiji. Attention will be concentrated on the vital part the judiciary should play in making the constitutional scheme work.

(1) The Presumption in Favour of Constitutionality

The Constitution contains no specific provision - as distinct from implications [20] - that the constitutionality of legislation is to be presumed. However, an examination of the stand taken by the American, Australian and Indian courts shows quite clearly that the judiciary has imposed limits upon the power of judicial review by adopting the presumption in favour of the constitutional

---

20 As to which see p.329 , post.

validity of legislation.

In the United States, a presumption in favour of the constitutionality of legislation was settled quite early. It was strongly stated that:[21]

> It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favour of its validity, until its violation of the constitution is proved beyond all reasonable doubt.

This presumption has been held to mean that before the judiciary may review any law in the light of the Constitution:[22]

> The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

The presumption of constitutionality is given added weight if the statute has been in force for a long period.[23] But this weighting will play a decisive role only where there is ambiguity or doubt as to some expression in the statute.[24] Thus it has been held that where the meaning of statute is doubtful, its practical construction by the executive is entitled to great weight but where

---

21 Ogden v Saunders 12 Wheat. 213, 270 (1827).

22 Fletcher v Peck 6 Cr. 87, 128 (1809).

23 Life and Casualty Ins. Co. v McCray 291 U.S. 566 (1933).

24 Swift v United States 105 U.S. 691 (1882).

the meaning appears to the court to be clear, no practice inconsistent with that meaning can have any effect.[25]

It follows from this presumption that the burden rests upon him who seeks to attack the legislation as unconstitutional.[26] The Court has stated that:[27]

> There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds.

In Australia too the Court has accepted the presumption of constitutionality. The Privy Council approved and adopted the statement that:[28]

> [U]nless ... it becomes clear beyond reasonable doubt that the legislation in question transgresses the limits laid down by the organic law of the Constitution, it must be allowed to stand as the true expression of the national will.

In India also the Supreme Court has accepted the principle

---

25 United States v Alger 152 U.S. 384 (1893); Fairbanks v United States 181 U.S. 283 (1901).

26 Basu, op. cit., 199.

27 Middleton v Texas Power Co. 249 U.S. 152, 157 (1919).

28 Shell Co. of Australia Ltd v Federal Commissioner of Taxations [1931] A.C. 275, 298; see also Owners of S.S. Kalibia v Wilson (1910) 11 C.L.R. 689; Harding v Federal Commissioner of Taxations (1917) 23 C.L.R. 119, 134; Attorney-General for Victoria v The Commonwealth (1945) 71 C.L.R. 237; Waterside Workers Federation v Commonwealth Steamship Owners' Association (1920) 28 C.L.R. 209, 219.

of the presumption in favour of constitutionality. Fazl Ali J. enunciated the principle thus:[29]

> The presumption is always in favour of the constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles.

What will be the position in Fiji? It is submitted that the courts in Fiji should accept the same principle whereby constitutionality is presumed, with certain limitations. This submission is made not because of the views of the courts in other jurisdictions but because of the implications of certain provisions contained in the Constitution.

Almost invariably, the issue of constitutionality of legislation in the United States, and to a significant extent in India and Nigeria, arises in relation to fundamental rights provisions. Constitutional issues do arise in relation to other matters, but almost all relate to basic human rights. It is in this field that the real conflict arises between the subjects and the state and it is here that the courts have the unenviable task of reaching a balance between the two conflicting interests.

Almost all the sections on fundamental rights in the Fiji Constitution[30] have provisions providing for derogation from fundamental rights; the typical provision containing such exceptions[31]

---

29 Chiranjit Lal v Union of India (1950) S.C.R. 869, 879; See also Basu, op. cit., vol. 1, 202 - 203.

30 See ss. 6, 9, 11, 12, 13, 14 and 15.

31 Emphasis added. This qualification appears in the provisions referred to in the footnote 30.

and qualifications states that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section ... except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It is submitted that such a provision presupposes the validity of the measure or of any action or thing done thereunder. There is an implied presumption in favour of constitutional validity. In substance, the provision states that to render the measure inconsistent with the fundamental right protected by the relevant section of the Constitution, it must be "shown not to be reasonably justifiable in a democratic society". The provision also begins with a supposition of validity inasmuch as it commences by stating that "nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention" of the relevant fundamental right unless it is shown not to be reasonably justifiable. It follows that not only is there a presumption in favour of constitutional validity but the onus is placed on the person challenging the legislation. The provision requires the measure or action to be held constitutional unless it is shown not to be reasonably justifiable in a democratic society.[32] If this is established, the legislation is invalid.

This state of affairs is very unfortunate as it undermines the real value of fundamental rights. The basic idea of the fundamental rights provisions, as will be seen,[33] is the protection

---

32 As to a discussion of the phrase "reasonably justifiable in a democratic society" see pp. 453 et seq., post.

33 Ch. XI, post.

of the individual from the arbitrary actions of the executive and the legislature, and governmental agencies generally. Fundamental rights ought to be the rule and derogation from them the exception. Hence the onus ought to be on the State to show justification for any derogation from fundamental rights. The onus ought to be on the State to prove that a certain state of affairs exists which requires the invoking of the provisoes and qualifications to fundamental rights.

Furthermore, the present position could create procedural difficulties for a litigant attempting to have a statute declared unconstitutional.[34] It has been seen[35] that, under section 16 of the Parliamentary Powers and Privilege Ordinance, evidence of proceedings in Parliament is not admissible as of right but is at the mercy of the House, the presiding officers or the Governor-General, depending on whether or not the House is in session. In practice, it will be far easier for the party claiming validity (usually the State) to secure the required consent than for the party asserting invalidity.[36]

It is submitted that it would have been better for the provisions to require the State to justify any derogation from fundamental rights. This would have meant that basic rights were the rule rather than the exception and would have given true effect to the intention that rights be guaranteed and have enhanced their value.

---

34 This contention is made on the basis that s. 16 is itself constitutional. As to the contention that s. 16 is unconstitutional, see pp. 265 et seq., ante.

35 Pp. 265 et seq., ante.

36 See further p. 271, ante.

However, the judiciary in Fiji can still "rectify" such shortcomings of the Constitution. The courts ought not to act on the presumption of the constitutionality of legislation unless the language of a statute is ambiguous. Nor should they strain the language of a statute, unless the ordinary rules of interpretation so require, in order to uphold the validity of a statute. The courts in Fiji ought to heed the views of the High Court of Australia:[37]

> [The Court] will always assume, where the language of Parliament is ambiguous, that it did not intend to exceed its powers, and will construe ambiguous expressions so as to maintain the validity of the legislation, if it is possible to do so without doing violence to the language used. But the Court is not justified in saving the constitutionality of an Act by giving to the words of the legislature a meaning which they cannot reasonably bear.

On the question of the burden of proof, it is submitted that the Fiji courts ought not to require the burden of proof to be beyond reasonable doubt but on the balance of probabilities. This rule of proof beyond reasonable doubt seems also to be a product of the policy of judicial self restraint invoked by the courts in the United States and other countries. That such a rule developed in the United States, India and Australia is understandable inasmuch as those constitutions do not contain as many exceptions and provisos, particularly to the fundamental rights provisions. As will be seen later,[38] the Fiji Bill of Rights contains little to inhibit the curtailment by the State of fundamental rights. The exceptions and provisos are so wide that one is left with the impression that

---

37 Owners of S.S. Kalibia v Wilson (1910) 11 C.L.R. 689, 708.

38 Pp. 453 et seq., post.

restraint is the rule and liberty the exception rather than "liberty is the rule and restraint is the exception".[39] The whole idea of the fundamental rights provisions would be defeated if the legislature could, without much inhibition, make inroads into fundamental rights in Fiji. As the constitutional provisions stand, it seems that the legislature in Fiji enjoys the benefits of all worlds. There is a presumption of constitutionality of legislation; the onus is on the party attacking the legislation; the legislature has very wide powers, because of the many exceptions and provisos, to make inroads into the fundamental rights provision. Hence, the courts in Fiji must, in order to make the fundamental rights provisions effective, at least establish that the burden of proof is on the balance of probabilities. They would be well justified in doing so.

As has been seen, one of the reasons justifying the presumption of constitutional validity of legislation is the recurring proviso which states that:[40]

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of [the provisions for certain specified reasons unless it is] shown not to be reasonably justifiable in a democratic society.

It is "shown" and not "proved". Had the latter word been used, the subject would have enjoyed less protection. The word "shown", it is submitted, is a milder requirement. In Jones v Director of Public Prosecutions,[41] it was necessary to interpret the word

---

39 E.S. Corwin, The Constitution and What It Means Today (12th ed., 1958), 221.

40 See nn. 30 & 31, p.328, ante.

41 [1962] A.C. 635.

"show" in the phrase "tending to show" in the Criminal Evidence Act 1898. The Crown contended, inter alia, that "tending to show" meant tending to prove. The House of Lords rejected this contention. Lord Reid questioned:[42]

> Does [tend to show] mean tend to prove or tend to suggest?

His Lordship answered the question by saying:[43]

"In my judgement 'tends to show' means tends to suggest". Further, His Lordship equated "show" with "reveal".[44] Viscount Simonds also stated:[45]

> Primarily ["show"] may mean a visual demonstration, but in relation to the giving of oral evidence it can only mean "make known".

Accordingly, it is submitted that in the above provision of the Fiji Constitution "shown" ought to be interpreted as "suggesting" or "disclosing", as opposed to "proving". Prima facie "proof" would be enough. At most, it ought to be on balance of probabilities. As long as the "proof" advanced by the party alleging infringement of the Constitution "suggests" or "reveals" or "discloses" on the face of it that the matter legislated in terms of the proviso cannot be justifiable in a democratic society, the Courts in Fiji ought to accept that as sufficient to discharge the

---

42 Ibid., 663.

43 Idem.

44 As did Lord Morris of Borth-Y-Gest; ibid., 689.

45 Ibid., 659.

burden and onus of proof. When such a prima facie invasion is shown, then the onus, it is submitted, ought to rest on those sustaining the legislation or defending it to prove a complete justification for the derogation from the constitutional rights secured by the Constitution.

Furthermore, the obligation to discharge the onus should depend upon the character of the right involved and the nature of the breach. There are certain rights which are truly basic to a free society in the sense that without them democracy will not survive. Even the Fiji Constitution expressly recognises certain rights as "fundamental".[46] These rights are absolutely essential for a "society of free man and free institutions".[47] These rights, it is submitted, stand on a different ground from, say, the right to contest an election or the right to citizenship.

In the United States, the Courts have accepted the "preferred position" of certain rights guaranteed by the First Amendment. It was for this reason that the Supreme Court held that the presumption of constitutional validity of legislation is inapplicable

---

46 See s. 3 which provides:

> Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely -
>
> (a) life, liberty, security of the person and the protection of the law;
> (b) freedom of conscience, of expression and of assembly and association; and
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation ... (Emphasis added)

47 See the preamble to the Fiji Constitution.

where an enactment appears on its face to invade the fundamental rights guaranteed by the First Amendment. Thus in Saia v New York,[48] a municipal ordinance prohibited the use of amplifying devices casting sound upon streets and public places, except with the permission of the Chief of Police, but it did not prescribe standards for the exercise of his discretion. A majority of the Supreme Court of the United States held that the ordinance violated the constitutional right of free speech. Mr Justice Douglas, in announcing the opinion of the majority, said:[49]

> We hold that s. 3 of this ordinance is unconstitutional on its face, for it establishes a previous restraint on the right of free speech in violation of the First Amendment which is protected by the Fourteenth Amendment...

The Supreme Court applied a similar rule in relation to infringement of other fundamental rights guaranteed by the First Amendment, viz., freedom of press,[50] freedom of religion[51] and freedom of assembly.[52] In all these cases the court held the rights therein specified to be in a "preferred position" under the Bill of Rights.[53] It was for this reason that the Supreme Court

---

48 334 U.S. 558 (1948).

49 Ibid., 559.

50 Lovell v Griffin, 303 U.S. 444 (1938).

51 Cantwell v Connecticut, 310 U.S. 296 (1940).

52 Hague v Committee for Industrial Organisation 307 U.S. 496 (1939).

53 However, there have been protests against this theory of the "preferred position" of the fundamental rights provisions, e.g. Frankfurter J. in Kovacs v Cooper, 336 U.S. 77, 88 and 90 (1948) and in Dennis v United States, 341 U.S. 494, 526 (1951); Justice Jackson in Brinegar v United States, 338 U.S. 160, 180, (1949).

seems tohave maintained that, when there is such a prima facie invasion of the right in question, the onus will rest upon the party maintaining the validity of the legislation to show that the legislation was justified on some "clear and present dangers" to public security. Thus in Thomas v Collins[54] the court stated:

> The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice.
>
> For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger.

The Court went on to distinguish the upholding of legislation affecting other matters. It stated:[55]

> The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion in pursuasion ... must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interest, give occasion for permissible limitation.

Thus the application of this "double standard" has been accepted

---

54 323 U.S. 516, 529 (1944) (Emphasis added).

55 Ibid., 530 (Emphasis added).

by the Supreme Court of the United States.[56]

The position in India has been succinctly put by Basu:[57]

> [T]hough the general presumption in favour of the constitutionality of the law arises when a restriction imposed by the law is impugned under Article 19 which relates to fundamental freedoms, if the Petitioner succeeds in showing that the impugned law prima facie violates any of the rights coming under any of the sub-clauses of that Article, the onus then shifts upon the Respondent to show that the legislation comes within the permissible limits imposed by the Article and also to place materials before the Court in support of that contention.

He concludes that:[58]

> If the Respondent does nothing in that respect, it is not for the Petitioner to prove negatively that it is not covered by any of the permissive clauses e.g., that the legislation is not for the public welfare and the like. If however, the Respondent shows that the law is covered by one of the permissible grounds of restriction ... then the onus to show that the restriction is unreasonable would shift back to the Petitioner.

It is submitted that the courts in Fiji ought to play a creative role and give real significance to the fundamental rights provisions.

---

56 E.g., Hague v C.I.O. 307 U.S. 496 (1939); Bridges v California, 314 U.S. 252 (1941); Jones v Opelika, 319 U.S. 103 (1943); West Virginia State Board of Education v Barnette, 319 U.S. 624 (1943); Thomas v Collins, 323 U.S. 516 (1944); Saia v New York 334 U.S. 528 (1948); Kovacs v Cooper 336 U.S. 77 (1948); Terminiello v Chicago, 337 U.S. 1 (1949). See generally Henry J. Abrahams, Freedom and the Court (2nd ed., 1972), Ch. II, 8 - 28. Cf. Basu, op. cit., vol. I, 207 - 209.

57 Basu, op. cit., vol. I, 208, citing Saghir Ahmed v State of U.P. (1954) S.C.A. 1218, 1234.

58 Basu, op. cit., vol. I, 208.

Judicial review of legislation affecting fundamental rights ought to be placed on a different plane from that of other constitutional provisions. There are at least three justifications for such an approach.

(a) The very nature of the basic rights and freedoms demands such an approach. These rights and freedoms are the foundation for all other freedoms in a free democratic society. Mr Justice Jackson pointed out:[59]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

In the same case the learned Judge clearly distinguished the Bill of Rights provisions from other regulatory provisions of the Constitution of United States. Thus he stated:[60]

> In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake ... The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a "rational basis" for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds.

---

59 West Virginia State Board of Education v Barnette, 319 U.S. 624, 638 (1943).

60 Ibid., 639.

(b) The very language of the constitutional provisions providing for fundamental rights supports the contention that the Bill of Rights provisions are in a special position. All the provisions relating to fundamental rights are couched as specific limitations on legislative or executive power. They specifically state that "no person shall be deprived" of his life, liberty and so forth. The language used is not merely explicit; it is categorical. There are of course exceptions and provisos, but nonetheless it is the character of the right and not the exceptions which should determine where the individual's freedom ends and the State's power begins.[61]

(c) The fundamental rights provisions are for the protection of individuals as opposed to groups. They are intended to protect individuals whether they fall into minority groups or larger groups. The usual interest or pressure groups have easier access to the legislative and administrative processes to obtain redress of public grievances than does the racial, political or religious minority group or an individual. The minority groups or individuals are the ones who are in most need of protection.

Accordingly, it is submitted, the presumption of constitutional validity and rules as to onus and burden of proof adopted in the United States should be applied in Fiji. But in the operation of the rules, the nature of the breach and the character of the right involved should be decisive. The more basic the right involved the greater ought to be the burden of justifying the derogation. The ultimate solution will be provided by the judiciary.

---

61 Thomas v Collins, 323 U.S. 516 (1944).

(2) The Doctrine of Severance

(a) General

The doctrine arises in cases where only part of a statute infringes the Constitution. The question then arises whether the whole enactment should be struck down or only that part which is unconstitutional. The general rule in the United States has been that, if any particular provision in a statute is unconstitutional and such a provision is independent of or severable from the rest, only the offending provision should be declared invalid by the court. If the provision is not severable, the whole statute must be struck down.

> It is elementary that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.[62]

In applying the doctrine, the fundamental consideration is the intention of the legislature. In the absence of a legislative declaration that invalidity of a portion of a statute shall not affect the remainder, the presumption is that the legislature intends the act to be effective in its entirety.[63] In the United States, the legislature has used separability or saving clauses whereby this presumption has been expressly negatived.[64] The

---

62 Pollock v Farmers' Loan and Trust Co. 158 U.S. 601, 635 (1894).

63 Williams v Standard Oil Co. 278 U.S. 235 (1929).

64 E.g., Carmichael v Southern Coal Co. 301 U.S. 495 (1936)

statute will contain a direct statement of separability followed by a declaration of intent that all the provisions of the enactment are to be given effect irrespective of the invalidity of other provisions of the same enactment. In such cases it becomes the duty of the court to sift the legislation. As a result, wherever an act contains an unobjectionable provision separable from those found to be unconstitutional, it becomes the duty of the court to so declare and to maintain the enactment in so far as it is valid.[65] However, a provision that the invalidity of any part shall not affect the remainder is not an "inexorable command" but merely operates to negative the ordinary presumption that the statute was intended to operate in its entirety.[66] In other words the presumption of severability created by a legislative declaration may be overcome or rebutted by establishing the clear probability that the legislature would not have been satisfied with the statute unless it had included in the invalid part.[67]

The question of severability applies not only to a section of a statute in relation to the whole statute but also to different parts of the same section.

> As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another fall, unless the two are so connected or dependent on each other in subject matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section for the distribution into

---

65 El Paso and North Eastern Railway Co. v Gutierrez 215 U.S. 87 (1909).

66 Carter v Carter Coal Co. 298 U.S. 238 (1935); Dorchy v State of Kansas 264 U.S. 286 (1924)

67 Carter v Carter Coal Co., supra; Dorchy v State of Kansas, supra.

> sections is purely artificial; but whether they are essentially and inseparably connected in substance, - whether the provisions are so interdependent that one cannot operate without the other.[68]

An unconstitutional amendment to a statute is clearly separable from the original enactment. If the original enactment is constitutional but a subsequent amendment is found to be unconstitutional, the statute will be read without the amendment.[69]

Whether or not there is a severability or separability clause, one part of a statute cannot be held unconstitutional and another part as separable, if they are mutually dependent upon one another.[70] Whether the provisions of a statute are so interwoven that the invalidity of one requires that others fall is a question of statutory construction and legislative intent.[71] The doctrine of severability would not be applied where the effect would be "to substitute for the law intended by the legislature one they may never have been willing, by itself to enact".[72]

The general test of severability, as laid down by the Supreme Court of the United States, may be stated as follows:[73]

---

68 Loeb v Columbia 179 U.S. 472, 490 (1900); see also Berea College v Kentucky, 211 U.S. 45, 55 (1908).

69 Frost v Corporation Commission 278 U.S. 515 (1928).

70 Carter v Carter Coal Co. 298 U.S. 238, 313 (1935).

71 Idem.

72 Poindexter v Greenhow, 114 U.S. 270, 304. (1885); see also United States v Reese, 92 U.S. 214, 221 (1875).

73 Robert L. Stern, "Separability and Separability Clauses in the Supreme Court", (1937-1938) 51 Harv. L. Rev. 76. It is acknowledged that significant assistance has been derived from this article.

The invalidity of part of a law or of some of its applications will not affect the remainder:

(a) if the valid provisions or application are capable of being given legal effect standing alone, and

(b) if the legislature would have intended them to stand with the invalid provisions struck out.

In Australia, too, the doctrine of severance has become part and parcel of the working of the Constitution. As has been seen,[74] the process of severance has been applied in Australia by two methods - "reading down" and "blue pencilling".[75] Reading down puts into operation the principle that, as far as reasonably possible, statutes should be construed as being constitutional.[76] Blue pencilling occurs when the invalid part of an enactment containing two or more distinct provisions can simply be struck out without any need to reword the rest.[77]

Reading down is merely a technique of construction. Hence it will yield to any contrary intention appearing in the Act.[78] However, if a statute cannot be read down, it does not necessarily follow that the whole enactment is invalid. The next inquiry is whether the invalid parts can be severed from the rest. Here the Australian courts have adopted the American approach, but have emphasised that severance of one part of a statute is not accept-

---

74 P.178, ante. For a fuller treatment of the position in Australia see Wynes, op. cit., 46 - 53 and C. Howard, Australian Federal Constitutional Law (2nd ed., 1972), 18 - 27; Sawer, op. cit. 113.

75 As to the explanation of these terms see pp.178 et seq., ante.

76 E.g., D'Emden v Pedder (1904) 1 C.L.R. 91.

77 See p.178, ante.

78 E.g., Federated etc. Service Association v New South Wales Railway Traffic Employees' Association (1906) 4 C.L.R. 488.

able if it alters the meaning of the remaining parts, in effect producing a new law. This "new law" test was adopted in R v Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow and Co.[79] In this case, on the issue of the constitutionality of a statute, it was suggested that the court should decide whether the legislature would have adopted what was left after severance of the invalid parts. If the answer is in the affirmative, severance is in order, otherwise not. Three judges adopted the "new test".[80] Thus Griffith C.J. stated:[81]

> Are they severable? It is contended, on the authority of decisions of the Supreme Court of the United States, which are entitled to the greatest respect that the test is this, that if the Court, on a consideration of the whole Statute, and rejecting the parts held to be ultra vires, is unable to say that the legislature would have adopted the rest without them, the whole Statute must be held invalid. With profound deference I venture to doubt the accuracy of this test .... I venture to think that a safer test is whether the Statute with the invalid portions omitted would be substantially a different law as to the subject matter dealt with by what remains from what it would be with the omitted portions forming part of it.

Isaacs J. analysed the test as follows:[82]

> If good and bad provisions are wrapped up in the same word or expression, the whole must fall. Separation is there from the nature of the case impossible, and as it is imperative to eject the bad ... the good must share the same fate. But where the two sets of provisions are not, so to speak, physically blended ... further considerations are necessary....
>
> If [the good and the bad parts] 'are so mutually

---

79 (1910) 11 C.L.R. 1.

80 Griffith C.J., Barton and O'Connor J.J.

81 Ibid., 26 - 27.

82 Ibid., 54.

> connected with and dependent on each other ... as to warrant a belief that the legislature intended them as a whole and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.'

In Australia, as in the United States, severability clauses play an important role. As well as the specific provision in various legislation and the practice of "reading down", section 15A of the Acts Interpretation Act 1901 - 1966 provides that:

> Every Act shall be read and construed subject to the Constitution, and so as not to exceed the legislative power of the Commonwealth, to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power.

This section has been interpreted as a general legislative direction to apply the doctrines of reading down and severance wherever possible. It operates as an indication of legislative intention additional to the term of any particular Act. Basically it does not affect the principles of reading down or severance.[83]

(b) The Position in Fiji

It is submitted that the doctrine of severability must be applied by the courts in Fiji. This is strongly implied by section

---

83 Howard op. cit., 23 - 26. See R. v Poole, ex parte Henry (No. 2) (1939) 61 C.L.R. 634, esp., at 652; Fraser Henleins Pty Ltd. v Cody (1945) 70 C.L.R. 100, esp., at 127; Australian National Airways Pty. Ltd v Commonwealth (1945) 71 C.L.R. 29, esp., at 92.

2 of the Constitution, which enjoins that any law offending the Constitution shall be void "to the extent of the inconsistency". This means that, when a provision of a law is held to be unconstitutional on account of inconsistency with the provisions of the Constitution, only the repugnant provisions of the law in question, and not the whole law, shall be treated by the courts as void. Inconsistency with or repugnance to the provisions of the Constitution may arise in two ways - first in relation to the application of the law and secondly in relation to the words or language of the statute.[84] Accordingly, it is submitted, it is inherent in section 2 that cases of severability will fall into two general classes, one when the invalidity is apparent in the language of the enactment and the other when the invalidity is apparent only in certain applications of it. Cases in the first class may be dealt with by severing the unconstitutional words or sections. With the second class, such 'blue pencilling' will not be appropriate; here the courts must decide how the broad terms of an enactment must be construed to limit its application to constitutional bounds. This is a similar approach to the 'reading down' of the Australian courts.

It is submitted that whether there ought to be "severance" as to application and/or language must in the ultimate depend upon legislative intent. It is a question whether the legislature would have intended the valid parts or application of an enactment to stand if it had known, when the law was enacted, of the invalidity of the remainder. But it is unlikely that the legislature would have directed its attention to the question now the subject of judicial inquiry. Hence the court will have the difficult task of ascertaining what the intention of Parliament would have been if

---

84 This distinction is made by Stern loc. cit. 79.

such a situation had been contemplated. In the United States and Australia, there seems to be no problem so long as there is a severance clause in the enactment being considered. In the absence of such a clause, the whole matter is left to conjecture on the part of the court. In such a case, the court ought to have recourse to the terms of the statute and its legislative history. However, when neither the statute itself nor its legislative history offers any clue to the intention of Parliament, it is submitted that the court should look to the policy sought to be achieved by the enactment. The court should consider whether the policy of the enactment will be better achieved by partial application or by its complete nullification. The court ought also to consider whether the curtailed enactment would be substantially a different law (subject matter) from what it would be with the impugned portions included in it.[85] Furthermore, if the valid and invalid parts are so mutually connected with and dependent upon each other as to lead the court, upon applying the language to the subject matter, to believe that Parliament intended them as a whole, and did not pass the valid parts as independent provisions, all the provisions so connected and dependent must fall together.[86]

It is submitted that penal statutes should be invalidated *in toto* and the rule of partial application ought not to apply. This accords with the general principle that penal statutes must be strictly construed and that criminal law should be unambiguous. If there is a severability clause, the position would of course be

---

85 *R.* v *Commonwealth Court of Conciliation and Arbitration, Ex parte Whybrow & Co.* (1910) 11 C.L.R. 1, 26 - 27.

86 Ibid., 54.

different.[87] Nonetheless even with such a clause, strict construction must be placed on the application of the legislation.

> Penal statutes ought not to be expressed in language so uncertain. If the Legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.[88]

When invalidity arises from the words of an enactment as opposed to its application, the problem is less involved. In such a case, the simplest course is to excise the offending part of the enactment and then see whether the remainder conforms with the intentions of the legislature.

In this field, it is submitted, the United States Supreme Court has applied the same tests both to statutes imposing criminal penalties and to those involving only civil obligations.[89] The intention of the legislature is of paramount importance in determining the validity of a statute. It was on the issue of legislative intent that the court in some cases held the parts remaining after severance valid[90] and in other cases invalid.[91]

---

87 Sonzinsky v United States 300 U.S. 506 (1937).

88 United States v Reese 92 U.S. 214, 220 (1875).

89 E.g., Allen v Louisiana 103 U.S. 80 (1880), where a civil statute was held inseparable and New York Central and H. R.R. Co. v United States 212 U.S. 481 (1909), where a criminal statute was held separable.

90 Utah Power and Light Co. v Pfost 286 U.S. 115 (1952).

91 Guinn v United States 238 U.S. 347 (1915).

It is submitted that whether the issue be in the application of the statute or its language, the court will remain free to decide each case the way it pleases without having its discretion fettered by any restraining doctrine. The issue of severable application differs from the issue of severable language only in that in the latter instance the court does not need two alternative formulas. There is no such need because the statement of the general principles for determining severability, as they appear in United States decisions, is necessarily phrased in such broad language that the court can easily hold the provisions of any statute separable or inseparable, as it chooses. In fact, it is very difficult at times to reconcile decisions on the issue of separability. A striking example is provided by the two cases involving substantially identical congressional legislation regulating trading in grain futures, Hill v Wallace [92] and Chicago Board of Trade v Olsen. [93]

The purpose of the Future Trading Act 1921 was to regulate trading in grain futures, and to avoid manipulation of the market by establishing a system of rules applicable to Boards of Trade designated by the Secretary of Agriculture as contract markets. The Secretary was authorised to withdraw his designation and to force refusal of trading privileges to persons violating the Act or any rules or regulations established thereunder. In order to compel Boards of Trade to comply with the regulatory system established for "designated contract markets", section 4 of the Act imposed a prohibitive tax of twenty cents a bushel upon all

---

92 259 U.S. 44 (1922).

93 262 U.S. 1 (1923).

Boards of Trade not designated as contract markets by the Secretary. The statute contained a separability clause. In Hill v Wallace[94] section 4 was held unconstitutional on the ground that it was not really a tax but an attempt to regulate intra-state transactions, which was not within the power of Congress. The court expressly declared that it was unnecessary to consider whether the transactions directly affected interstate commerce.[95] The court also held that all the regulatory provisions were invalid inasmuch as section 4 was so interwoven with the regulations that they could not be separated, notwithstanding the separability clause.

Immediately afterwards Congress amended the Act in question. In substance this new Act was identical in its regulatory aspects with the original Act except that section 4, instead of imposing a penalty tax on the transactions on Boards of Trade not designated as contract markets excluded such transactions from interstate commerce and the mails. It seems that Congress heeded the court's intimation in Wallace that trading in grain futures might be regulated under the "commerce clause". However, the relationship between section 4 and the regulatory provisions was exactly the same as in the original Act. In both Acts section 4 contained a sanction which compelled persons to trade only on markets subject to the Secretary's regulations. Both contained the same separability clauses. In Chicago Board of Trade v Olsen[96] the regulatory provisions of sections 5 and 6 were upheld

---

94 Supra.

95 259 U.S. 44, 68 - 69 (1944).

96 Supra.

as a valid exercise of the commerce power of Congress. However, the interesting part is that the court refrained from passing on the validity of section 4 on the ground that the separability clause made it manifest that this section was separable from the remainder of the Act.

It is submitted that the decisions are clearly irreconcilable. A decision that section 4 of the new Act was separable from the regulatory provisions cannot be squared with the earlier ruling that the identical regulatory provisions of the old Act were inseparably interwoven with section 4. It is considered that separability need not be reciprocal; one part of a statute may be entirely capable of standing alone if another part is held invalid while the matter might not be independent of the former.[97] However, in the two cases under consideration the statutes were not of the type of which it may be said that separability need not be reciprocal. Section 4 was not independent in the sense of having an independent purpose of its own. On the contrary it was the primary sanction behind the other provisions.[98] Hence, it is submitted, it is impossible to reconcile these two decisions delivered by the same judge within a period of about eleven months. It has been suggested that:[99]

> The two decisions on separability, written within eleven months of each other by the same judge, can be reconciled only on the ground that the Court approved of the substance of one statute and not of the other.

---

97 E.g., Brazee v Michigan 241 U.S. 340 (1916); Weller v New York 268 U.S. 319 (1925); cf. Securities and Exchange Commission v Electric Board and Share Co. 18 F. Supp. 131 (S.D. N.Y. 1937).

98 Cf. Stern, loc. cit., 112.

99 Idem.

The decisions of individuals judges are equally difficult to reconcile with those of other members of the same court on the issue of severability. In important cases judicial decisions on severability often reflect the attitude of the particular judge towards the merits of the particular statute and are not an attempt to apply objectively the principles determining severability.[1] It is submitted that the constitutional philosophies of individual judges determine the scope of severability.

(c) The Severability Clause

As has been seen, whether or not the provisions of a particular statute may be severed is a question of statutory construction which necessarily involves an examination of legislative intent. The power of Parliament to enact such laws as it desires, within its constitutional competence, of course carries with it the power to declare its legislative intent. This intention is gathered from the enactment itself and the permissible extrinsic sources. When legislative intent is not clear, courts are called upon to decide the issue. A severability clause is one way, adopted in the United States and Australia, to state legislative intent. In the United States the effect of such a clause was first raised before the courts in 1910.[2] The standard severability clause at present used takes this form:[3]

> If any provision of this chapter, or the application of such provision to any person or circumstance, shall be held

---

1 E.g., Pollock v Farmers' Loan and Trust Co. 157 U.S. 429 (1895) and rehearing 158 U.S. 601 (1895); Lemke v Farmers Grain Co., 258 U.S. 50 (1922); and Railroad Retirement Board v Alton R.R. 295 U.S. 238 (1936).

2 Stern, loc. cit., 115.

3 Labor Management Relations Act 1947, Title 29 s. 144.

> invalid, the remainder of this chapter, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

Initially, the courts regarded these provisions in the literal sense. Separability clauses were regarded as conclusively establishing legislative intent that the valid parts of the enactment were to be saved unless what remained was incapable of standing alone.[4] Thus, in Hill v Wallace[5] the court stated:

> Undoubtedly such a provision furnishes assurance to courts that they may properly sustain separate sections or provisions of a partly invalid act without hesitation or doubt as to whether they would have been adopted, even if the legislature had been advised of the invalidity of part.

Nevertheless that court, as has been seen, held the invalid part so interwoven with the valid part that they were inseparable.

In some cases the court has given automatic effect to the separability clause[6] while in others[7] it has reverted to the principle stated in the dissenting judgement of Chief Justice Hughes:[8]

> [W]hen Congress states that the provisions of the Act are not inseparable and that the invalidity of any provision

---

4 Stern, loc. cit., 116.

5 259 U.S. 44, 71 (1944).

6 E.g., Chicago Board of Trade v Olsen, supra, and National Life Insurance Co. v United States 277 U.S. 308 (1928).

7 E.g., High Land Farms Dairy v Agnew 300 U.S. 608 (1937); Hill v Wallace, supra, and Carmichael v Southern Coal and Coke Co. 301 U.S. 495 (1937).

8 Carter v Carter Coal Co. 298 U.S. 238, 322 (1935).

> shall not affect others, we should not hold that the provisions are inseparable unless their nature, by reason of an inextricable tie, demands that conclusion.

It is submitted that the severability clause has not made legislative intent more conspicuous or clearer than it would otherwise have been. The clause merely assists in determining legislative intent. It "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely, not an inexorable command".[9]

This view has developed into the presumptions of divisibility and indivisibility. As has been said:[10]

> In the absence of such a legislative declaration, the presumption is that the legislature intends an act to be effective as an entirety....
>
> The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provision or the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains.

Before this pronouncement and the development of the new

---

9 Dorchy v State of Kansas 264 U.S. 286, 290 (1924).

10 Williams v Standard Oil Co. 278 U.S. 235, 241 (1929); see also Champlin Refining Co. v Corporation Commission 286 U.S. 210, 234 (1932); Railroad Retirement Board v Alton R.R. 295 U.S. 330, 362 (1935).

principle, the courts had assumed that statutes were separable even in the absence of severability clauses. But it is submitted that this pronouncement and the concept of presumptions has had various effects.

First, the courts are likely to apply the same principles to a statute whether or not it contains a severability clause. In other words, a statute with a severability clause would not be in any way better off because the court will still insist on seeking the intention of the legislature. Of course a statute with a severability clause will appear to have made that intention clearer than one without such a clause.

Secondly, if the court strictly applied the presumption of indivisibility to statutes not containing separability clauses, more statutes would be held invalid in toto. It would then be necessary in order to avoid the unfavourable presumption of indivisibility, to include severability clauses in all statutes, particularly those of doubtful constitutionality.

Accordingly, the value of severability clauses would not depend so much on their presence as on their absence. In other words, if a severability clause is present, the court must still ascertain legislative intention and the clause assists the court in determining that intention. If a severability clause is omitted, the court is still obliged to find the intention of the legislature, but in such a case there is a presumption of indivisibility.

In any event, the severability clause cannot be interpreted literally. The court cannot give literal effect to the intention of the legislature as contained in a severability clause. If this were done, it would lead to absurdity. If an enactment has a major

objective and auxiliary ones and the major provision is held invalid, would the court be justified in upholding the validity of the auxiliary provisions which could be meaningless without the main provision? The answer must be in the negative. Railroad Retirement Board v Alton R. R.[11] affords a striking illustration. The majority of the court held invalid the provision for the pooling of the pension funds for the employees of all the carriers. It was argued that a statute establishing a single pension fund for all the railroads could not remain as an operative law with the provision for the single fund eliminated. To save anything, the court would have been required to write a completely new statute. As the court said:[12]

> But notwithstanding the presumption in favour of divisibility which arises from the legislative declaration, we cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole .... In this view we are confirmed by the petitioners' argument that as to some of the features we hold unenforceable, it is 'unthinkable' and 'impossible' that the Congress would have created the compulsory pension system without them. They so affect the dominant aim of the whole statute as to carry it down with them.

It is fortunate that severability clauses have not been given literal interpretation. If this had been done, it could have produced a result which it could not be imagined the legislature intended. Thus in Mazurek v Farmers Mutual Fire Ins. Co.,[13]

---

11 295 U.S. 330 (1935). See also Williams v Standard Oil Co. 278 U.S. 235 (1929), and Stern, loc. cit., 123.

12 295 U.S. 330, 362 (1935).

13 320 Pa. 33; 181 Atl. 570 (1935). The facts and substance of the case are related as they appear in Stern, loc. cit., 124.

the only valid provision of a statute (apart from the severability clause itself) was the section repealing the earlier law which the unconstitutional provisions were to replace. The legislature had clearly enacted the repealing clause only to permit the new statute to take the place of the old; it was not intended that the old law be repealed and the subject matter left entirely free from regulation. But literal application of the severability clause would have left neither the old nor the new statute in effect. The clause could not possibly be given a literal interpretation.

This raises the further question as to what principles should the courts in Fiji adopt to decide whether a severability clause is to be given a literal interpretation or not. It has been said that:[14]

> A reasonable solution of the problem was to give the separability provision effect except when the result would have been clearly unintended or unworkable. Some of the decisions appear to have accepted this view. And the doctrine that a separability clause, while not an "inexorable command", establishes a presumption of divisibility which may only be overcome "by considerations which establish 'the clear probability that the invalid part being eliminated the legislature would not have been satisfied with what remains' " is in substantial accord with it.

It is submitted that the use of a severability clause has necessitated courts in the United States giving effect to its literal meaning in some cases but not in others. It may be doubted that the legislature avails itself of a separability clause whenever it desires the provisions of law to be severable, and omits to use the device only because it has a contrary intention. The reason

---

14 Stern, loc. cit., 124.

for the omission may simply be careless draftsmanship or the fact that there are few doubts, if any, in relation to the validity of the statute. This, however, may be taken as evidence of a contrary intention on the part of the legislature. It seems that the use of severability clauses will have to be considered in each and every statute otherwise the court may be left to apply the presumptions of divisibility and indivisibility on the basis of the absence or otherwise of a severability clause.

It has been suggested [15] that:

> If separability clauses were made applicable only to provisions or situations which the legislature really intended to be separable, and which could be administered separately, the clause might receive more judicial respect .... A separability clause should refer specifically to those sections, paragraphs and provisions of an act or to those applications of it which the legislature really intended to stand alone.

But it is submitted that this proposition is based on several assumptions. This is particularly apparent when the proposition is adopted in the context of the constitutional position in Fiji. It presupposes that there are very experienced and conscientious draftsmen who are well trained in the constitutional implications of statutes. It assumes that the draftsmen, and for that matter the legislators, are fully aware and conscious of the constitutional implications in all the statutes and all the sections that are passed. This is quite unrealistic. Fijian draftsmen and legislators will not have this experience or appreciation because the Constitution is still in an early stage of development and operation. No case

---

15 Ibid., 125.

is known to the writer whereby the validity of any enactment has been the subject of judicial review on the basis that it is in conflict with the Constitution.

Furthermore, it is submitted that the type of severability clause suggested by Mr Stern is impracticable. All the problems of separability in relation to each and every statute cannot be recognized in advance. This is particularly so in the case of a new Dominion like Fiji which has had very little experience of government under a written Constitution - a Constitution with limitations particularly in the fundamental rights area where it will be most difficult to anticipate the problem of severability. It will only be in obvious cases that the question of constitutionality will be expressly adverted to. In a country like the United States of America, which has had experience of government under a written constitution for almost two centuries, the courts every year strike down legislation as being unconstitutional. In a new Dominion like Fiji there is more chance of statutes being declared unconstitutional. Until 1966, the Fiji legislature had few limitations on its competence to legislate; there were repugnancy[16] and the apparent limitation involved in the phrase "peace, order and good government" of Fiji.[17] In all other respects, as to both the content of legislation and its manner and form, there was no limitation. Supremacy of Parliament was the rule for all practical purposes. However, now and at the earliest since 1966, there are substantial limitations on the power of the legislature.[18] There

---

16 E.g., the Colonial Laws Validity Act 1865, s. 5.

17 As to this, see pp. 215 et seq., ante.

18 E.g., Ch.VI, and ss. 67 and 68 of the Constitution. See also pp. 206 et seq., ante.

is now supremacy of the Constitution as fundamental law as opposed to the sovereignty of Parliament as described by Dicey.[19]

Accordingly, it is submitted that the chances of appreciating, except perhaps in very obvious cases, the likelihood of unconstitutionality of proposed legislation would be remote. Moreover to provide for severability in relation to specific parts of every enactment would obviously not be a practicable measure. This of course is the case not only in Fiji but also elsewhere.

In any event, it is submitted that the use of a specific severability clause could have the unfortunate result of causing the court to presume that in all cases where the provision was not included, the legislation was intended to be inseparable.[20] It would be an example of expressio unius est exclusio alterius. The presumption would be excluded in relation to a particular statute by including not only a specific severability clause but also a general one applicable to the whole enactment. Even then there would remain the danger of expressio unius est exclusio alterius being applied to other statutes. If any statute did not contain the general severability clause, it could be interpreted as evidence that severability was not intended. We would be thrown back to the problem discussed earlier. Accordingly, it is submitted that the neatest solution in Fiji would be to include in the Constitution provision for a general severability clause and for that provision to be entrenched so that it may not be the subject of an implied repeal.[21]

---

19 See p.210, ante.

20 Cf. Stern, loc. cit., 127.

21 Cf. McCawley v The King [1920] A.C. 691 and Bribery Commissioner v Ranasinghe [1965] A.C. 172.

There is no question of the beneficial nature of a severability clause. The attitude of court should be to effectuate rather than to thwart legislative policies. In this field an analogy can be drawn from the related doctrine that a statute should be given that construction which will sustain it. Hence, a suitable general severability clause would be the legal foundation for the principle that the courts should uphold the validity of statutes. The general severability clause suggested should include both the application and the language of all enactments as discussed above.[22] This would also be consistent with the principle of enforceability intrinsically present in sections 17 and 97 of the Constitution which make it a pre-requisite to the invoking of these enforcement sections that the applicant be in some way affected by the contravention of the Constitution. Hence, if there is a breach of fundamental rights provision, the complainant must prove its breach "in relation to him".[23] Thus the question of application to him will arise. The law will not be struck down despite the fact that the application of the law to others would contravene the Constitution. Severability would play an important role and should be given a firm legal foundation. But a general severability clause would need to give way, where contrary intention was shown in a particular statute.

However, in the absence of such a general clause, the courts in Fiji must apply the principles of severance already discussed. It is submitted that certain guiding principles that the courts in Fiji may apply in their determination of the question of severability

---

22 See pp. 346 et seq., ante.

23 See pp. 184 et seq., and p. 682, post.

can be stated.

1. If the valid and the invalid portions are so interwoven that they cannot be separated, both parts must be struck down as invalid. This does not necessarily mean that, if part of the same section is valid and another part invalid, the whole section must be struck down, but this will occur where the substance of the provision, whether in the same section or a different section of the same Act, are so connected or dependent that one cannot stand without the other. The two parts must be

> so connected or dependent on each other in subject matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section ... but whether they are essentially and inseparably connected in substance, - whether the provisions are so interdependent that one cannot operate without the other. [24]

This dependency may be of various types. For instance, the whole Act or a substantial part thereof may be part of a connected scheme. In such circumstances severance would be very difficult if not impossible.[25]

2. If the portion which is held invalid renders the remainder devoid of any effective operation, the whole must be struck down. Thus in Attorney-General of Alberta v Attorney-General of Canada [26] of the two parts to the statute in question one was held

---

24 Loeb v Columbia 179 U.S. 472, 490 (1900); See also Berea College v Kentucky 211 U.S. 45, 55 (1908).

25 Attorney-General of Alberta v Attorney-General of Canada [1947] A.C. 503.

26 Supra.

ultra vires. The Judicial Committee stated:[27]

> The whole thing hangs together, and if part II goes there is nothing left to be added to the statute law of Alberta which would have any effective operation.

3. If the invalid portion is struck down and in so doing the nature or the structure or the object of the enactment is not affected, severance would be in order. The statute should remain substantially the same after the invalid portion is excised.

> [O]r, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all.[28]

In such cases it may be said that the invalid and valid portions are independent and complete on their own and in no way dependent on the other.

> If the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.[29]

4. If after excising the invalid part, what remains cannot be enforced without making alteration and modifications therein - or "rewriting" the enactment - the whole must be struck down and severance will not apply. The doctrine of severance does not entail judicial legislation.[30]

---

27 [1947] A.C. 503, 519.

28 Ibid., 518.

29 Pollock v Farmers Loan and Trust Co. 158 U.S. 601, 635 (1894).

30 R. v Commonwealth Court of Conciliation and Arbitration, ex parte Whybrow and Co. (1910) 11 C.L.R. and United States v Reese 92 U.S. 214 (1875).

C. Extrinsic Evidence

(a) General

A question of paramount practical importance, as far as the interpretation of the Constitution in Fiji is concerned, is the admissibility of extrinsic evidence. As a general rule, in the interpretation of an ordinary statute, extrinsic evidence has been held to be inadmissible. "Extrinsic evidence" includes such matters as the legislative history, official reports and the like. Hence, the exclusion extends not only to the proceedings in Parliament, but also to extra-parliamentary matters such as the report of a Royal Commission or other committee which preceded the enactment of the legislation.[31] This rule is "well settled" and "well established".[32]

However, Lord Halsbury once referred to the report of the Commission that led to the enactment in question for the purpose of seeing what was the mischief or defect intended to be remedied.[33] Thus in cases where the courts find it relevant to

---

31 For critical examinations of the exclusionary rule see F. Frankfurter, "Some Reflections on the Reading of Statutes", (1947) 47 Colum L. Rev. 527; D.G. Kilgour, "The Rule Against the Use of Legislative History", (1952) 30 Can. Bar Rev. 769; K.C. Davis, "Legislative History and the Wheat Board Case", (1953) 31 Can. Bar Rev. 1; J.A. Corry, "The use of Legislative History in the Interpretation of Statutes", (1954) 32 Can. Bar Rev. 624.

32 Hollinshead v Hazleton [1916] 1 A.C. 428, 438, per Lord Atkinson; see also Re Viscountess Rhonddas' Claim [1922] 2 A.C. 339; P. Brazil, "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular" (1964) 4 Univ. Queens. L.J. 1.

33 Eastman Photographic Materials Co. v Comptroller-General of Patents, Designs, and Trade Marks [1898] A.C. 571.

consider the state of the law and of affairs preceding the Act in question, they have a wide choice of materials upon which they may draw for information.[34]

As regards the determination of the constitutionality of a statute the courts have, as a general rule, in countries where they have the power of judicial review, admitted extrinsic evidence to see whether a statute is in conflict with the Constitution. In this field of admissibility of extrinsic evidence, the distinction between the interpretation of an ordinary statute and a Constitution has been well drawn by Evatt J. who said:[35]

> In considering the question of admissibility of evidence, a fundamental distinction has to be drawn between cases where the court has no function committed to it except that of interpreting a statute, and cases where, in accordance with a constitutional charter, the court has to determine whether there has been an infringement by the legislature of some overriding constitutional provision. In the former case, the court's function is to interpret the language which the legislature has employed, though, even there, the court is not bound to shut its eyes to public general knowledge of the circumstances in which the legislation was passed.
>
> In the latter case, the court may entirely fail to fulfil its duty if it restricts itself to the language employed in the Acts which are challenged as unconstitutional.

There may be instances in which legislation is constitutional only when there is a factual basis justifying it. On the other hand, there may be instances in which legislation prima

---

34 Ibid., See also Assam Railway and Trading Co. v Commissioner of Inland Revenue [1935] A.C. 445, esp. at 458 - 459.

35 Deputy Federal Commissioner of Taxation (N.S.W.) v W.R. Morgan Pty Ltd. (1939) 61 C.L.R. 735, 793.

facie valid is unconstitutional because of factual background not revealed by the statute. May the courts receive evidence of the relevant facts in order to determine the validity of legislation?

In the United States, the general rule is that in the determination of the constitutionality of any legislation the court cannot necessarily reach a decision by a mere comparison of the legislation with the relevant portion of the Constitution. It may first need to establish the truth of some question of fact which the statute postulates or with reference to which it is applied; the validity or otherwise of the enactment may turn on the determination and conclusions arrived at.[36] The court's surveillance of constitutional facts has been emphatically acknowledged by the United States Supreme Court which stated:[37]

> In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function.

Hence in the United States a statute may be without inherent constitutional invalidity but may be impugned in its application

---

36 H.W. Bickle, "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action", (1924-25) 38 Harv. L. Rev. 6. This article has a comprehensive collection of all the major American decisions in this field.

37 Crowell, Deputy Commissioner v Benson, 285 U.S. 22, 60 (1922); see also Zorach v Clauson, 343 U.S. 306, 322 (1952); Watts v Indiana, 338 U.S. 49, 51 (1949); and Hoover & Allison Co. v Evatt, Tax Commissioner of Ohio, 324 U.S. 652, 659 (1945).

to the particular situation.[38] It has been held that:[39]

> although an ordinance might be lawful upon its face, and apparently fair in its terms, yet, if it was enforced in such a manner as to work a discrimination against a part of the community, for no lawful reason, such exercise of power would be invalidated by the courts.

Where the reasonableness of a statute in relation to the permissible objects depends upon factual considerations, the Court will admit evidence of those facts.[40] Where the validity of a statute is challenged on the ground that the circumstances, on the existence of which the statute was based, have changed and the application of the statute to the changed circumstances has become unconstitutional, evidence will be also admitted.[41]

The Supreme Court in the United States has relied on information and facts obtained or brought before it in various ways. It has dealt with the question just as it deals with the question of law, as a matter dependent upon reasoning and precedent and not merely upon facts disclosed upon the record.[42] Another method has been the inclusion in the brief of counsel of pertinent statistical data, legislative practice, scientific

---

38 Bikle, loc. cit., 11.

39 Caroline W. Dobbins v City of Los Angeles 195 U.S. 223, 240 (1904); see also Yick Wo v Hopkins 118 U.S. 356 (1886).

40 Weaver v Palmer Bros. 270 U.S. 402 (1925); Borden's Farm Products v Baldwin, 293 U.S. 194 (1934); United Fuel Gas Co. v Railroad Commission of Kentucky 278 U.S. 300 (1928).

41 Bikle, loc. cit., 12.

42 McCulloch v Maryland 4 Wheat (U.S.) 316 (1819); Hepburn v Griswold, 8 Wall (U.S.) 603 (1869); Legal Tender Cases, 12 Wall (U.S.) 457 (1870).

discussion by eminent persons in their respective professions, departmental reports, and the like and by asking the court to take judicial notice of the materials so presented.[43] In certain cases, evidence has been submitted at a trial with reference to the underlying questions of fact.[44] Evidence of the report of the committee in charge of a bill has been admitted to show the basis upon which the legislation rested.[45] Thus the Supreme Court, in deciding the constitutionality of a statute, will act on the facts as stated or admitted in the pleadings and affidavits,[46] or facts of which the court may take judicial notice, or those which appear on the face of the record or are proved by other evidence.[47]

In Australia, too, the courts have admitted similar evidence to determine the constitutionality of legislation. It has been said that:[48]

---

43 Bikle, loc. cit., 13; see also Muller v Oregon 208 U.S. 412 (1908); Bunting v Oregon 243 U.S. 426 (1917); Stettler v O'Hara 243 U.S. 629 (1917); Adkins v Children's Hospital 261 U.S. 525 (1923).

44 Smith v Texas, 233 U.S. 630 (1914); The Chastleton Corporation v Sinclair, 264 U.S. 543 (1924).

45 James Everards Breweries v Day, 255 U.S. 545 (1924).

46 Hadacheck v Sebastian 239 U.S. 394 (1915).

47 Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1, 222; see also Hughes and Vale Pty. Ltd v The State of New South Wales (No. 2) (1955) 93 C.L.R. 127, 165.

48 Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1, 222.

> it is the duty of the Court in every constitutional case to be satisfied of every fact, the existence of which is necessary in law to provide a constitutional basis for the legislation.

The courts in Australia acquire the relevant constitutional facts either by invoking the doctrine of judicial notice or by reliance on the evidence given by the parties to the proceedings.[49] At an earlier time it was generally assumed that the only facts relevant to the solution of problem of validity were facts of which judicial notice could be taken.[50] Subsequently however, the High Court has accepted and considered evidence led by the parties.[51]

(b) The Position in Fiji

In Fiji, no case has so far arisen which called for the judicial determination of the principles involved in the admission of extrinsic evidence. However it is submitted that the

---

49 P.H. Lane "Facts in Constitutional Law", (1963) 37 A.L.J. 108, 109; see also Sir Owen Dixon, "Marshall and the Australian Constitution" (1955) 29 A.L.J. 420.

50 J.D. Holmes, "Evidence in Constitutional Cases", (1949) 23 A.L.J. 235, 237; see also Stenhouse v Coleman (1944) 69 C.L.R. 457, 469 where it was stated: "Ordinarily the Court does not go beyond matters of which it may take judicial notice. This means that for its facts the court must depend upon matters of general public knowledge".

51 Jenkins v Commonwealth (1947) 74 C.L.R. 400; Sloan v Pollard (1948) 75 C.L.R. 445; Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1.

very nature of the constitutional provisions in Fiji will necessitate the judiciary embarking upon such enquiries as have been made in America and Australia. It is contended that if the constitutionality of a law is impugned in a legal proceeding in Fiji there is no reason for not admitting evidence which could be called in other proceedings.

A distinction must however be drawn between ordinary facts and those facts on the basis of which the court determines the constitutionality of a law - "constitutional facts",[52] as they have been described.

> Facts in litigation fall into two classes, ordinary facts and legislative facts - constitutional facts are a particular type of the latter class. Constitutional facts are those on the basis of which the court determines the content of a law in relation to the Constitution .... Constitutional facts ... are described as 'information', 'factual information', 'background facts'; they are 'of a general nature', furnishing 'information which the court should have in order to judge properly of the validity of this or that statute or of this or that application by the executive government ... of some power or authority it asserts'; they are the facts 'the existence of which is necessary in law to provide a constitutional basis for the legislation'.[53]

Some provisions in the Constitution are such that they can easily be compared with a statute to see whether the two are in harmony or in conflict. For example, a statute which curtails the right of an individual to make application to the Supreme Court to enforce his rights under the Constitution may be held

---

52 Lane, loc. cit., 108.

53 Idem. The term "constitutional facts" will be used hereafter.

to be intrinsically invalid.[54] Other provisions in the Constitution may not be capable of being so readily compared with a statute until the court has first established the truth of some question of fact which the legislation postulates or with reference to which it is applied. In such cases the validity or otherwise of the enactment will turn on the conclusions reached by the court on that question of fact. An example is the question as to what is "reasonably justifiable in a democratic society". This phrase recurs in the fundamental rights provisions of the Fiji Constitution.[55]

In the United States and Australia, as has been noted, the courts have judicially determined questions of fact affecting the constitutional validity of legislative action, either by the doctrine of judicial notice or by admitting evidence of constitutional facts as they would admit evidence of other facts. It is submitted that the courts in Fiji should exercise their powers under the doctrine of judicial notice very sparingly, if at all. Ordinarily it may be assumed that the training and experience of a judge qualifies him to decide questions of law, including the conflicts between the text of a constitutional provision and that of a statute. However, with respect, there is no sound basis for the assumption that a judge is equally well qualified to determine underlying questions of fact on which the constitutionality of a law depends, unless those facts are adduced in

---

54 Balewa v Doherty [1963] 1 W.L.R. 949; Gopalan v State of Madras (1950) S.C.R. 88.

55 See ss 6, 9, 11, 12, 13, 14 and 15. As to this phrase see pp.453 et seq., post and Akar v Attorney-General for Sierra Leone [1970] A.C. 853.

evidence and properly weighed by him or are such as to justify judicial notice being taken. Otherwise there is the possibility that "the decision will depend on a judgement or intuition more subtle than any articulate major premise".[56]

Where the court acts on facts of which it takes judicial notice, the litigant may not know of which facts the court will take judicial notice. There may also be uncertainty if judges hold different views as to the facts of which judicial notice should be taken. This is particularly so in regard to facts which are not obviously incontestable. Hence arises the necessity for adducing evidence of those facts.

Furthermore, if as a rule the court acts on evidence properly presented to it, the evidence will be on record. This will not be so if judicial notice is taken of facts. Inclusion of evidence in the record would strengthen the position of a court by dispelling any suggestion that the court was proceeding upon artificial and academic assumptions rather than upon the facts of daily life.

Also, it is submitted, the litigant challenging the validity of legislation must be accorded a judicial determination of the question in such a way that he is able to meet the issues squarely before the court. If the court intends to invoke the doctrine of judicial notice, the litigant ought to be warned so that he can refute the facts of which judicial notice might be taken. This is not to deny the court the power to take judicial notice of facts.

---

56 Lochner v New York 198 U.S. 45, 76 (1905), Holmes C.J.

What is being said is that, if the court is asked or, of its own motion, intends to take judicial notice of matters, the court, in order to command public support, should base its decision upon the record of the case before it. It should find in the evidence, or in matters properly brought before it for judicial notice, a complete basis for a determination of the validity of the legislation in question. The record will then disclose the basis for its validity or invalidity.

The formulation of law (and policy) in the judicial process will obviously gain strength to the extent that information will replace guesswork, intuition or general impressions. Questions of law will be firmly based on findings of fact and matters of record. There will not be an uneven mixture of a priori conjectures and partially informed guesses. Also when the extra-record facts are disputable or rebuttable, a determination that fails to take into account any explanation or rebuttal that may be offered would render the process unfair.

It is submitted that if the court, in determining constitutional facts, intends to utilise the doctrine of judicial notice, it should in most cases afford each party reasonable opportunity to present to it information relevant to the propriety of taking judicial notice of the matter concerned. However, it is submitted, this rule must be discretionary, not absolute. One should bear in mind that,

> In conducting a process of judicial reasoning, as of other reasoning, not a step can be taken without assuming something which has not been proved.[57]

---

57 C.J.B. Thayer, A Preliminary Treatise on Evidence (1898), 279.

Thus a judge may assume the meaning of an ordinary word without consulting a dictionary, or take judicial notice of the fact that New Zealand is in the southern hemisphere without calling for an atlas or expert evidence. Practically every simple case involves assumption of many facts which are not proved. But, there are some facts which may be the core of the whole case and very close to the centre of the controversy between the parties, while others may be incidental or unimportant. Some facts may be obviously indisputable while others may be debatable; some facts may be obvious in relation to others; some facts may be obvious to a certain class of person while not so to others. One could go on multiplying instances. In view of so many variables, it is submitted, the courts should have a discretion as to whether or not the parties are notified when it is intended to take judicial notice of facts.[58]

If the judge plans to take notice of facts assumed to be obvious and a party requests the opportunity to challenge them, it is submitted that such a party should be accorded the opportunity. The Supreme Court in the United States stated:[59]

> [N]otice, even when taken, has no other effect than to relieve one of the parties to a controversy of the burden of resorting to the usual forms of evidence ... 'It does not mean that the opponent is prevented from disputing the matter by evidence if he believes it disputable.'

After all, judges are fallible human beings. One of the functions

---

58 Davis, loc. cit., 977.

59 Ohio Bell Tel,Co. v Public Utilities Commission 301 U.S. 292, 301 -302 (1936).

of the adversary system is to point out mistakes so that they may be corrected. Rulings on judicial notice should be subject to reconsideration to the same extent as any other ruling.[60] This means that requests for reconsideration of the ruling must be entertained and, needless to say, the court will retain a discretion to allow or deny the request. Such an exercise of discretion, both in the original instance and in the request for reconsideration, must be subject to the review of the higher courts.

In summary, it is submitted that the courts should have the discretionary power:

(i) to determine whether or not to notify the parties of its its intention to take judicial notice of facts and

(ii) to allow or to deny the opportunity to challenge facts that have been judicially noticed either by calling evidence or by argument. The exercise of such a discretion, should be guided by the following factors:

(a) Whether the facts are close to the centre of the real controversy between the parties or are background or incidental facts.

(b) Whether the facts are obviously indisputable or probably debatable or certainly debatable.

(c) Whether the matters of which judicial notice has been taken are contained in sources of indisputable accuracy.

(d) Whether the facts are such that they may be judicially

---

60 Davis, loc. cit., 979.

noticed by virtue of any statutory provision.

(e) Whether there is an application by either party to rebut the facts or matters judicially noticed.

However, should the matter be such that it is close to the centre of the real controversy between the parties, the discretion ought to be exercised in favour of rebuttal evidence or argument. After all, the entire case may depend on the truth or otherwise of such matter or on facts requiring proof. In matters pertaining to constitutional facts, the court would be dealing with facts and matters which determine the content of a law and policy; ordinarily such facts are of general nature and do not merely concern the immediate parties. Their general application necessitates the investigation of every angle. The very validity or constitutionality of the legislation will depend upon determination of such facts, so the courts must admit any rebuttal matter that a party wishes to introduce. When the court makes a finding after both parties to the litigation have had the chance of subjecting it to thorough criticism and cross examination, such a finding rests on a more solid foundation than if the court took judicial notice of a matter which might later be found contestable.[61] On the question of the admissibility of extrinsic evidence when deciding the constitutionality of legislation, the Australian courts have taken the view that adjudicating upon a constitutional matter is not only of concern to the parties to the proceedings but to everyone.

Accordingly, it is said that not all the facts peculiar to the

---

61 Lane, loc. cit., 110.

parties should be admissible in evidence when making findings of constitutional facts. The facts must be such as are common to all persons. Kitto J., when speaking of typical facts which form the basis of a constitutional decision, stated:[62]

> Although it is only in litigation between parties that the Court may decide whether Commonwealth legislation is valid, it is upon the validity of the legislation in relation to all persons that the Court has to pronounce. The question is whether the legislation forms part of the law of the Commonwealth. Since it is impossible to affirm the validity of a measure upon a particular basis of fact unless that basis of fact can be seen to be common to all persons, it cannot be material, for the purpose of considering validity, to decide an issue of fact which is of such a nature as to admit of different findings in different cases.

In Fiji the admissibility of evidence to ascertain constitutional facts would be of paramount importance. This is particularly so in regard to the fundamental rights provisions. As has been said, evidence could be introduced to establish that a law valid in its outward form is "in substance" or "in reality" beyond the power of the legislature. The Judicial Committee of the Privy Council has stated:[63]

> But where the law-making authority is of a limited or qualified character, obviously it may be necessary to examine with some strictness the substance of the legislation for the purpose of determining what it is that the Legislature is really doing.

---

62 Australian Communist Party v The Commonwealth (1951) 83 C.L.R. 1, 276; Peanut Board v Rockhampton Harbour Board (1933) 48 C.L.R. 266, 304, per Evatt J; Breen v Snedden (1961) 106 C.L.R. 406.

63 Attorney-General for Ontario v Reciprocal Insurance [1924] A.C. 328, 338.

In such cases, it may be imperative for the courts to investigate by means of evidence the real nature of the legislation. As Evatt J. stated:[64]

> But it is often necessary to produce evidence in order to determine whether the executive has employed for one purpose a power which can only be lawfully exercised for another. On such occasions the field of admissible evidence is widened.
>
> A similar rule applies although no executive action is involved or questioned. The issue may be whether legislation which at first sight appears to conform to constitutional requirements is colourable or disguised. In such cases the court may have to look behind names, forms and appearances to determine whether or not the legislation is colourable or disguised. This is a fundamental principle applicable to the Constitutions of the United States and Canada as well as to that of the Commonwealth of[Australia].

Evatt J. went on to say that the same principle is also applicable to constitutional guarantees or prohibitions, and if the legislation in effect produces the prohibited effect by indirect or devious methods,

> it may become the duty of the court to examine closely whether the legislature has deliberately set out to produce the forbidden result although by a somewhat indirect method. In principle there is no reason whatever why public announcements of governmental policy, official governmental records and communications, and even the records of the proceedings in parliament, including records of debates, must necessarily be excluded from the field of relevant evidence. In special circumstances, some of this material

---

64 Deputy Federal Commissioner of Taxation (N.S.W.) v W.R. Morgan Pty Ltd (1939) 61 C.L.R. 735, 794.

> may afford strong, even conclusive, evidence as to the scheme, object or purpose of the statute, although, as has been said: 'Generally speaking', however, 'the speeches of individuals' (in the legislature) 'would have little evidential weight'.[65]

It is imperative that the Fiji courts should have the power to investigate and examine the operation of the enactment which forms the subject of the attack. They will then be able to judge whether the enactment infringes the fundamental rights of the subject and in doing so, extrinsic evidence would be admitted to determine whether the legislation is valid or constitutional.

This will be of particular importance where a statute is passed on the basis of certain facts because, if those facts change, the enactment will become inoperative or unconstitutional.[66] The courts may need to hear evidence to determine whether the

---

65 Idem. See also Attorney-General for New South Wales v Homebush Flour Mills Ltd. (1936-37) 56 C.L.R. 390, 418 where Evatt J. stated:

> I am strongly of opinion that, where the court has to investigate the question whether a State enactment imposes a duty of excise, it may be necessary to enquire into the actual operation of the enactment ....
>
> Had the present question been, in my view, susceptible of doubt, I would have favoured an investigation into the operation of the present Act upon the milling business - an investigation which this court could have directed.

See also Attorney-General for British Columbia v McDonald Murphy Timber Co. [1930] A.C. 357, 383.

66 Armstrong v The State of Victoria (No. 2) (1957) 99 C.L.R. 28, 49 and 73 - 74.

facts have changed. Thus Dixon J. stated:[67]

> The American doctrine is that a law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further. It is not that it is invalidated by changing circumstances but rather that it never had a valid application except to or in existing conditions .... If a power applies to authorise measures only to meet facts, the measure cannot outlast the facts as an operative law.

Thus in Chastleton Corporation v Sinclair,[68] it was held that a law depending for its validity upon the existence of an emergency or other certain state of facts may cease to operate if the emergency ceases or the facts change, even though the legislation was valid when passed. In United States v Carolene Products Co.,[69] it was held that where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry. The constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.

Accordingly, it is submitted that, if an initially valid enactment is liable to be invalidated by circumstances, evidence to show or prove the change of circumstances should be admissible.

---

67 Australian Textiles Pty Ltd v The Commonwealth (1945) 71 C.L.R. 161, 180 - 181; See also Hume v Higgins (1949) 78 C.L.R. 116, 133.

68 264 U.S. 543 (1923). See also Penin v United States 232 U.S. 478, 486 - 487 (1913) United States v Carolene Products Co. 304 U.S. 144 (1937); Nashville, Chattanooga & St Louis v Walters 294 U.S. 405, 415 (1935).

69 304 U.S. 144 (1937).

That this is the position seems to have been the view of the Judicial Committee of the Privy Council in Fort Francis Pulp and Power Co. Ltd v Manitoba Free Press Co. Ltd,[70] although Viscount Haldane said:[71]

> [V]ery clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite.

The admissibility of evidence to establish changed circumstances would be of crucial importance in relation to the fundamental rights provisions of the Fiji Constitution because those provisions contain so many exceptions permitting derogation from fundamental rights.[72] Most of the exceptions relate to some specific purpose or object, e.g., "public safety", "public order", "public morality", "defence" and so forth; and, as will be seen,[73] the test is whether the derogation is "reasonably justifiable in a democratic society". When the power to legislate in derogation of fundamental rights provisions is defined by reference to such purposes or objects, it is submitted that the application of any principle, whereby validity is to be determined, must depend upon whether in fact there is a connection between the legislation in question and the specified object or purpose. This will necessitate the admission of evidence of the circumstances on enactment as well as at the time

---

70 [1923] A.C. 695.

71 Ibid., 706.

72 E.g., Constitution, ss. 5, 8, 9, 11, 12, 13, 14 and 15.

73 See pp.453 et seq., post.

of the challenge to the legislation.

> [A] law which nothing but transient circumstances justify is valid from its inception only in its operation in or upon those circumstances and never is or becomes capable of operating further.[74]

The Privy Council has recognised that where purpose is relevant to validity, evidence of the operation of the legislation is admissible.[75]

This question of admissibility of extrinsic evidence is important in cases where the legislature has declared the objects of the enactment in the preamble. Will the court be bound by the declaration of the legislature or may it admit evidence in rebuttal? It is submitted that the court ought not to be so bound; otherwise, the legislature may be able to achieve indirectly what it could not do directly. No doubt the court ought to give great respect to such a declaration but it should not be treated as conclusive because the legislature would then be able to flout the Constitution with impunity by ousting judicial review of legislation. In relation to the declaration in the preamble Latham C. J. stated:[76]

---

74 Australian Textiles Pty Ltd v The Commonwealth (1945) 71 C.L.R. 161, 180.

75 In Attorney-General for Alberta v Attorney-General for Canada [1939] A.C. 117, 130, the Judicial Committee stated:

> The next step in a case of difficulty will be to examine the effect of the legislation .... For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be.

76 South Australia v The Commonwealth (1942) 65 C.L.R. 367, 432. See also R. v University of Sydney; Ex parte Drummond (1943) 67 C.L.R. 95, 102 - 103; Chastleton Corporation v Sinclair Ltd 264 U.S. 543, 547 (1924); Block v Hirsh 256 U.S. 135, 154 (1921).

> The Court should treat this expression of the view of Parliament with respect. In a doubtful case it might turn the scale, the presumption being in favour of the validity of Acts rather than of invalidity. But such a declaration cannot be regarded as conclusive. A Parliament of limited powers cannot arrogate a power to itself by attaching a label to a statute.

From the foregoing there would appear to be a general consensus that extrinsic evidence may play a significant role in constitutional decisions. Facts or supposed facts and the views of the courts on those facts will assume great importance. The vital question is whether the facts should be the subject of judicial notice or be settled after the admission of evidence and cross examination of witnesses in open court. It is submitted that the second approach should be adopted in Fiji. To leave such matters to the assumed knowledge, the belief and even the prejudices of the judiciary would fail to accord these issues their proper importance. It would not only be unfair to leave such matters to the judiciary but it would also be undesirable. Political and policy questions may have to be determined, e.g., whether discriminatory legislation under section 15 (e) of the Constitution is "reasonably justifiable". Such important questions should not be answered by the judges without evidence of the facts being admitted. To leave such questions to the judges alone and to have them making unchallengeable assumptions without an inquiry conducted in open court will have undesirable results and possibly cause loss of respect for the judiciary.

Conclusion

From the foregoing consideration of only three representative principles of constitutional interpretation, it is obvious

that the courts in Fiji will have to adopt a liberal approach to constitutional interpretation. They should not adhere rigidly to the orthodox canons of statutory interpretation and apply them to the Constitution. The Constitution must be accepted as a dynamic, developing instrument. The whole structure of government - including all the necessary agencies - is based on the Constitution. The courts must be fully prepared to shoulder the burden of adapting the Constitution to contemporary social and economic requirements. They will be able to do so only by adopting methods of interpretation which will ensure the proper functioning of the Constitution according to its spirit.

In promoting the proper functioning of the Constitution no doubt the courts will, as far as permissible, ensure that "Parliament is mistress in her own house".[77] But this should not be the only factor for the courts to consider. There are other rights and interests entrenched in the Constitution as well as matters of "national" concern which must be recognised and protected. Effective government on the one hand and the rights of individuals and groups on the other must be reconciled by the courts.

It must be accepted that Constitutions are "living" instruments and "organic" enactments.[78] The spheres of

---

77 Edwards v Attorney-General for Canada [1930] A.C. 124, 136, per Lord Sankey.

78 British Coal Corporation v The King [1935] A.C. 500, 518.

activity of all three basic agencies of the state - the legislature, the executive and the judiciary - are delineated by it. The Constitution provides a framework within which the state can function. Hence to give full effect to such an instrument, a flexible and dynamic interpretation is necessary. As Holmes J. stated:[79]

> The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints.

Fiji, as a young nation, will have to move with the times and face up to many changes in all spheres of activity. Needs will vary at different stages of development. However, whilst society changes, the Constitution (like many others) prescribes special procedures for its amendment. Hence the interpretations placed on the provisions of the Constitution must be such as will permit modification without formal amendment. The Constitution must be treated as a "living tree capable of growth and expansion within its natural limits".[80] It should be the duty of the court to make a constitutional scheme work. This was acknowledged by Lord Sankey, L.C.,[81] who declared that the duty of court, in interpreting a constitution, is not

> to cut down the provisions of the [Constitution] Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion

---

79 Bain Peanut Co. of Texas v Pinson 282 U.S. 499, 501 (1930).

80 Edwards v Attorney-General for Canada [1930] A.C. 124, 136.

81 Idem.

> to a great extent, but within certain fixed limits, may be mistress in her own house ....

Furthermore, the Fiji Constitution like that of Ceylon, represents "a solemn balance of rights between the citizens .. [and contains] the fundamental conditions on which inter se they accepted the Constitution".[82] The Constitution is based on the general agreement of the three major races in Fiji - the Indians, the Fijians and the Europeans. The Constitution is the result of much give and take, involving various political considerations and issues of more far reaching importance than the rights and duties of individual citizens. Various checks and balances against the dominance of one race or one class have been provided for. Hence in interpreting the Constitution, the courts are bound to enter into questions of policy - an area which the courts have declared as beyond their competence when interpreting ordinary enactments.[83] Even in relation to the interpretation of a Constitution, the view has been advanced that it is no part of the functions of the judiciary to examine the social and political motivations of legislation.[84] This view, it is submitted, cannot be adopted in Fiji. The provisions of the Fiji Constitution require the courts to become involved with these questions.

As will be seen later,[85] a recurring but vital phrase in

---

82 Bribery Commissioner v Ranasinghe [1965] A.C. 172, 193.

83 See p. 320, ante.

84 C. Howard, Australian Federal Constitutional Law (2nd ed., 1972), 7.

85 Ch. XI, post.

the Constitution relating to fundamental rights is "reasonably justifiable in a democratic society". This phrase is used in those sections permitting derogations from fundamental rights. One example is section 15 which prohibits discriminatory legislation. A determination as to whether discriminatory legislation is "reasonably justifiable in a democratic society" must involve the courts in an examination of the social and, at times, the political justification for the legislation concerned. The meaning and implications of this phrase will vary from subject to subject and from one stage of social, economic or political development or needs to the next. The meaning and working of the fundamental rights provisions in Fiji - and hence the implication of the phrase in question - is going to change as society and other conditions change. Change in society is not restricted to social change but also includes factors such as economic conditions. The meaning of the phrase in question will be affected by the society's own "libertarian impulses".[86] When it comes to giving meaning and practical effect to guarantees of human rights, when in practice one will be called upon to evaluate and balance one interest against another - for example, freedom of speech against state security - the critical factors are likely to range well beyond a study of the written text and of legal decisions as to its meaning. They will include one's conviction (or absence of conviction)about the basic rights, and various social factors, the political climate and the needs of the day, as far as the society is concerned. In short, a reasonably close correlation between the law and society must be maintained.

---

86 E. McWhinney, "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (1959) 37 Can. Bar Rev. 16, 27.

CHAPTER X

THE EFFECTS OF "UNCONSTITUTIONAL LAWS"

A. Introduction

The concept of a society ordered by law presupposes that particular laws do not produce conflicting results when applied to the same facts. If two laws inconsistent with each other in this sense exist, a rule is needed to decide which of them prevails. This problem is anticipated by section 2 of the Fiji Constitution which, as has been seen elsewhere,[1] gives supremacy to the Constitution. It states that:

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

This section raises a number of issues. Is a law found to be inconsistent with the Constitution to be void ab initio? Is a distinction to be drawn between "inconsistent" laws passed before and after the commencement of the Constitution? Is the Constitution to have retrospective effect? What is the effect of judicial invalidation of a law? The problems will be dealt with under the following headings:

(a) The meaning of "inconsistency"

(b) Inconsistency of pre-Constitution laws.

(c) Inconsistency of post-Constitution laws.

(d) Legal consequences of judicial invalidation.

B. Inconsistency

"Inconsistency" is defined[2] as:

---

1 Pp. 210et seq., ante.

2 The Shorter Oxford English Dictionary (3rd ed. revised, 1964), 983.

> 1 . . . lack of accordance or harmony (with something or between things); incompatability, contrariety, opposition . . . .
>
> 2. Want of agreement between two things or parts of a thing; a discrepancy, an incongruity.

"Inconsistent" has been defined as:[3]

> Mutually repugnant; or contradictory; contrary the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other . . . .

From these meanings of the terms "inconsistency" and "inconsistent", it is submitted that for a law to be inconsistent it is really the impact or effect of the legislation rather than its form that matters. Legislation can be said to be inconsistent with the Constitution if both cannot stand together. A statute may on its face be quite consistent with the Constitution but it is necessary to look further and examine its substantive character and nature.

> The legislature need not adopt any form of statement or finding for, in the enforcement of restraints imposed by the . . . Constitution . . . this Court regards the substance of their enactments as controlling rather than mere forms of expression employed.[4]

Further the United States Supreme Court has declared:[5]

> In resolving the issue we are not concluded by the name or description of the tax as found in the act; our duty is to ascertain its nature and effect. 'The substance

---

3 Black's Law Dictionary (4th ed. revised, 1968), 907.

4 Chesebro v Los Angeles County Flood Control District, 306 U.S. 459, 464. (1938).

5 Stewart Dry Goods Co. v Lewis, 294 U.S. 550, 555 (1934).

and not the shadow determines the validity of the exercise of the power.'

A classic illustration of the application of the principle is the judgement of the Swaziland Court of Appeal in Ngwenya v Deputy Prime Minister and Another.[6] Ngwenya was elected a member of the Swaziland House of Assembly early in 1972. Soon afterwards, he was served with a deportation order made by the Deputy Prime Minister (the respondent) who was acting under section 9 (1) (g) of the Immigration Act 1964. Under that Act a citizen of Swaziland could not be deported. Ngwenya applied to the High Court to have the order set aside on the ground that as a citizen he was not liable to deportation. On 29 August 1972, the High Court, after hearing oral evidence, found on a balance of probability that Ngwenya was a citizen of Swaziland by birth and accordingly the deportation order was set aside.[7]

On 14 November 1972, the Swaziland Parliament passed an amendment to the Immigration Act, inserting a new section

---

6 (1973) - unreported - cited in W.A. Ramsden, "Judicial Protection in Swaziland" (1973) 6 The Comparative and International Law Journal of Southern Africa, 378. However, it is pertinent to note that the provisions of the Constitution referred to in the judgement may no longer be of any effect in Swaziland due to the purported rejection of the Constitution by King Sobhuza II and his Parliament. However the case is very relevant to the present discussion because the relevant provisions of Swaziland Constitution are substantially similar to the corresponding provision of the Fiji Constitution.

7 Ramsden, loc. cit., 378 et seq.

10 bis. This section established a tribunal consisting of five persons, to be appointed by the Deputy Prime Minister, to decide any doubtful question as to whether any particular person belonged[8] to Swaziland. It was specifically provided that the decision of the tribunal should not be subject to appeal by any court, but any person affected by it might appeal to the Prime Minister whose decision should be final. It also specifically provided that the tribunal had jurisdiction notwithstanding any judgement, decision or order previously made, inter alia, by any court on or in connection with any issue as to whether or not such a person belonged to Swaziland, and the decision of the tribunal or the Prime Minister would supersede any such previous judgement or decision of a court. The burden rested on the person concerned to prove that he "belonged" to Swaziland.

The Deputy Prime Minister appointed a tribunal under the new section 10 bis and through his permanent secretary referred to it the issue whether Ngwenya belonged to Swaziland in terms of the Act. Ngwenya applied to the High Court for an order declaring section 10 bis to be inapplicable to him and/or ultra vires the Constitution. The High Court gave judgement against Ngwenya who appealed.

---

8 S. 3 defined a person who belongs to Swaziland as:

(a) citizen of Swaziland; or

(b) a child, stepchild or child adopted in a manner recognized by law, under the age of sixteen years; or the wife;
of a person referred to in paragraph (a).

Under section 14 of the Constitution [9] (which was almost identical with section 14 of the Fiji Constitution), whilst the freedom of movement of non-citizens could be curtailed with impunity, that of citizens could be curtailed only under conditions specified in the Constitution. [10] None of those conditions applied in the instant case. Chapter 3 of the Constitution (an entrenched chapter) provided for "citizenship" rights. Section 26 (2), which was part of Chapter 3, provided that Parliament could by legislation deprive a person who is a citizen by registration or naturalisation of his citizenship. There was no other provision for depriving a citizen of his status.

Section 17 of the Constitution [11] (which was almost identical

---

9 S. 14 of the Swaziland Constitution provided:

> Protection of Freedom of Movement
> 14(1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely through Swaziland, the right to reside in any part of Swaziland, the right to enter Swaziland, the right to leave Swaziland ....
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provisions ....
> (d) for imposing restrictions on the freedom of movement of any person who is not a citizen of Swaziland ....

10 E.g., detention under an order of court, extradition, and so forth.

11 S. 17 of the Swaziland Constitution provided:

> Enforcement of Protective Provisions
> (1) If any person alleges that any of the foregoing provisions of this Chapter [which includes s. 14] has been, is being, or is likely to be, contravened in relation to him ... then... that person... may apply to the High Court for redress.

Subsection 2 gave the High Court jurisdiction to hear and determine the application "and make such orders" etc. as "it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter" (which included s. 14).

to section 17 of the Fiji Constitution) provided for the right to make an application to the High Court in respect of infringements of fundamental rights. Sections 14 and 17 were both entrenched provisions of the Constitution and could be amended only by special procedures. Section 10 bis was passed in the ordinary way. When this matter came before the Supreme Court, Hill C.J., in disallowing the application, stated:[12]

> S. [10 bis] is not intended to deprive any citizen of entrenched or indeed any rights of citizenship whatsoever. The Tribunal is established to decide an issue of citizenship only where a doubt exists as to whether a person is or is not a citizen. If the question is to be decided by a Court of law the result may be the same but the legislature, no doubt, is of the opinion that the Tribunal as constituted is in a better position to investigate and determine the issue. It must be assumed that the Tribunal will deal with the matter impartially and in accordance with the principles of justice.

However the Court of Appeal, in allowing the appeal, stated:[13]

> Broadly speaking the appellant's case was that the Constitution protects various rights belonging to Swazi citizens and expressly or impliedly gives the High Court jurisdiction to decide whether such rights have been infringed. In order to decide such issues the Court must decide whether the person affected is a Swazi citizen, such citizenship being dealt with in Chapter III of the Constitution. Legislative interference with such express or implied jurisdiction of the High Court would be an alteration of the Constitution, requiring a joint sitting.

The judgement of the Court of Appeal continued:[14]

> While this general approach can be supported, it is not

---

12 Ramsden, loc. cit., 382.

13 Ibid., 383.

14 Idem.

necessary to examine the matter on these wider lines. For there is available at least one example of an express constitutional grant of jurisdiction to the High Court which provides a test whether the Amending Act purports to alter the Constitution by curtailing the jurisdiction of the High Court. Section 56 (1) of the Constitution provides:-

'(i) The High Court shall have jurisdiction to hear and determine any question whether
(c) any person has been validly elected as an elected member of the House;'

Section 43, so far as material, reads -

'A person shall be qualified ... to be elected as an elected member ... of the House of Assembly if, and shall not be qualified to be so elected ... unless, he...
(b) is a person qualified for registered as a voter;'

Section 51, so far as material, reads -

'(i) ... a person shall be qualified to be registered as a voter for the purpose of elections of elected members of the House of Assembly if, and shall not be so qualified unless, he ... is a citizen of Swaziland.'

Since these provisions expressly grant jurisdiction to the High Court to determine whether a person elected to the House of Assembly is a citizen of Swaziland it had to be decided in the present proceedings whether the Amending Act purported to cut down that jurisdiction by granting sole jurisdiction on the issue whether a person belongs to Swaziland in terms of section 10 (a) to the Special Tribunal.

It was rightly conceded for the respondents that if the new section 10 bis introduced by the Amending Act did curtail the jurisdiction of the High Court under section 56 (1) (c) of the Constitution this could only be done effectively by a joint sitting under section 134. But it was argued by counsel for the respondents that, properly construed, the new section 10 bis is limited to proceedings connected with immigration and deportation and does not apply to questions of citizenship for the purpose of qualification to be elected to Parliament,

which remain within the jurisdiction of the High Court.

The suggested limitation, it was argued, is to be extracted from the use in subsections (2) and (7) of the new section of the expression 'in terms of section 10 (a)', which counsel submitted had the effect of restricting the proceedings in which the Special Tribunal was to have sole jurisdiction to immigration proceedings.

It seems to us that the respondent's argument seeks to read far more into the words 'in terms of section 10 (a)' than they can bear. On the face of them they do no more than show, by reference to section 10 (a) and so to section 3, what is meant by belonging to Swaziland. There is in our view no suggestion that the jurisdiction of the Special Tribunal is to be limited to any particular kind of proceedings. Nor does the respondents' argument receive any support from the opening words of section 10 (a), as was suggested.

Our view is reinforced by consideration of what would be the result of the High Court's continuing to have jurisdiction to declare a person a citizen so as to be eligible for election to Parliament, while the Special Tribunal would have jurisdiction to decide that he was not a citizen for immigration purposes and must be deported accordingly. It is inconceivable that in enacting the Amending Act Parliament intended to leave this obvious source of conflict unresolved.

It would be noted that our conclusion does not flow from the fact that the appellant was elected to Parliament. That is merely a concomitant circumstance, which illustrates the operation of the Amending Act if applied to section 56 (1) (c) of the Constitution. What makes the Amending Act bad is that it alters the substance of Section 56 (1) (c) without having been passed in accordance with section 134. Whether the jurisdiction granted to the High Court by section 56 (1) (c) was exclusive or not need not be decided. It was the exclusive jurisdiction given to the Special Tribunal which took away all jurisdiction, exclusive or not, granted to the High Court by section 56 (1) (c). It was not, and could not successfully have been contended that any part of the Amending Act could be severed from the rest and so be rescued from invalidity.

It is suggested that the Court of Appeal seems to have taken a long and roundabout way of coming to its decision, although the reasoning appears valid and cogent. A more direct approach would have been to invoke section 17 of the Constitution.[15] The purpose of this provision was clearly to enable the High Court to safeguard fundamental human rights from invasion by the legislature. Nevertheless, whatever approach was taken, it is clear that the real effect and impact of the amendment to the Immigration Act was to infringe the constitutional rights of the subject. Prima facie, the amendment was merely an amendment to the Immigration Act, but, on investigation, it transpired that it was more than that. It purported to alter and modify the Constitution - which it could not lawfully do if passed in the ordinary way. Accordingly, it was found to be inconsistent with the Constitution.

The same view was taken by the Privy Council in Balewa v Doherty.[16] There, too, it was held that the substance of the enactment was such that it took away the rights of the subject to make an application to the High Court for redress. Such a provision was contrary to the provisions of the Nigerian Constitution.

In determining the validity of an enactment on the basis of its substance, a number of principles have been adopted.

(a) The validity of legislation is not to be determined

---

15 See n. 11 p. 393, ante.

16 [1963] 1 W.L.R. 949. As to this case see p.270 ante. See also Gopalan v State of Madras (1950) S.C.R. 88.

by the motives or the "ultimate end" of a statute. Thus in R v Barger[17] there was a sharp difference of opinion as to the true nature of the legislation there in question (the Excise Tariff Act 1906). But there was a general agreement amongst the judges who held that the circumstance that an indirect effect may be produced by the exercise of an admitted power of legislation is irrelevant to the question of whether the legislature is competent to prescribe the same effect by direct law. Also irrelevant are the motive which actuated the legislature and the ultimate end desired. The constitutional validity is to be determined by what the law enacts.[18] Thus when the substance of an enactment is to be determined, it is not a general question as to whether the legislature has power by some means or other to acquire the end result of the legislation. The question of power must be considered separately in relation to the particular means adopted in the Act.[19] It is respectfully submitted that Latham C.J. illustrated the point well, when he stated:[20]

> The operation and effect of a customs duty on certain goods is to make the importation of those goods subject to the duty imposed. That is what the law does. The motive of Parliament may have been to assist a particular industry or business. When validity is in question, that fact is irrelevant. An indirect consequence of the law may be to ruin some other industry or business. That fact also is irrelevant.

---

17 (1908) 6 C.L.R. 40.

18 Bank of New South Wales v The Commonwealth (1948) 76 C.L.R. 1, esp. 152.

19 Idem.

20 Ibid., 186.

Thus it is the duty of the court, when the question of validity of legislation arises, to determine what is the actual operation of the law in question in

> creating, changing, regulating or abolishing rights, duties powers, or privileges, and then to consider whether that which the enactment does falls in substance within the relevant authorised subject matter, or whether it touches it only incidentally, or whether it is really an endeavour, by purporting to use one power, to make a law upon a subject which is beyond power. [21]

Ngwenya case is a good illustration of such a test.

(b) The court must have regard to the object, purpose and true intention of the enactment as a whole. The object of an Act will be ascertained from its actual operation and effect, and not merely from the statement by the legislature of its objects.[22] It has been said:[23]

> A statement of objects in an Act can operate like a preamble 'as a key to open the meaning of the makers of an Act and the mischiefs it was intended to remedy' ... but in the end the objects of the Act must be ascertained from its actual operation and effect.

The legislation must have some real connection with and afford some reasonable and substantial basis for the conclusion that it is for a purpose in respect of which Parliament has power to make laws.[24]

---

21 Ibid., 187.

22 Ibid. 248-253.

23 Ibid., 248.

24 Idem. See also Victoria v The Commonwealth (1942) 66 C.L.R. 488, 508; Australian Woollen Mills v The Commonwealth (1944) 69 C.L.R. 476, 490.

> If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field.[25]

Therefore, in short, in determining the validity of a law it is in the first place obviously necessary to construe the law and to determine its operation and effect, that is, what the Act in fact does. Secondly, it is necessary to determine the relation of that which the statute does to a subject matter in respect of which it is contended that Parliament has power to legislate upon. Hence a power to make laws on a certain subject matter is a power to make laws which in reality and substance are laws upon that subject matter. It is not enough that a law should refer to that subject matter or apply to it. For instance, an immigration law may apply to parliamentarians, but it cannot be said to be laws relating to members of Parliament.

(c) The effect of a statute is to be determined from the general object at which the legislation is aimed and not necessarily by its effect in a particular case. Thus in Thornhill v State of Alabama[26] the Court said:

> There is a further reason for testing the section on its face. Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting to license the dissemination of ideas .... [T]he rule is not based on any assumption that application for the license would be refused or would result in the imposition of other unlawful regulations. Rather it derives from an appreciation of the character of the evil

---

25 Gallagher v Lynn [1937] A.C. 863, 870.

26 310 U.S. 88, 97 (1939) (emphasis added)

> inherent in a licensing system ... It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it .... [I]t is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression.

It is submitted that, in determining the effect of legislation and its substance, both the indirect and direct effects ought to be judged by whether the effect is proximate and not remote or incidental. If the effect is proximate, then of course the statute should be struck down but not if the effect is merely indirect or a possible consequence. What is or may be proximate or incidental or of possible consequence may be illustrated by the decision of the Indian Supreme Court in Express Newspaper v Union of India.[27] A 1955 Act was enacted for the "amelioration of the conditions of the workmen in the newspaper industry". It provided, inter alia, for the fixing of wages rates by a Wage Board constituted by the Act It was contended that the Act would operate harshly upon the employers in the newspaper industry and that it might lead to the extinction of some concerns unable to bear the rates fixed by the Board above the contract rates. It was argued that this constituted an infringement of freedom of the press. The Court rejected the contention, while recognising that the press would be affected by the enactment. But the statute was not directed against the press as such; it was beneficient legislation intended to regulate the conditions of service. Hence the consequences alleged were not direct effects. As Bhagwati J. observed:[28]

---

27 (1959) S.C.R. 12, cited in Basu, op. cit., vol. 1, 230.

28 (1959) S.C.R. 12, 134-135 (emphasis added).

> These are all incidental disadvantages which may manifest themselves in the future working of the industry, but it could not be said that the Legislature in enacting that measure was aiming at these disadvantages when it was trying to ameliorate the conditions of the workmen. Those employers who are favourably situated, may not feel the strain at all while those of them who are marginally situated may not be able to bear the strain and may in conceivable cases have to disappear after closing down their establishments. That, however, would be a consequence which would be extraneous and not within the contemplation of the Legislature. It could therefore hardly be urged that the possible effect of the impact of these measures in conceivable cases would vitiate the legislation as such .... Unless [the effects] were the direct or inevitable consequences of the measure enacted in the impugned Act, it would not be possible to strike down the legislation as having that effect and operation. A possible eventuality of this type would not necessarily be the consequence which could be in the contemplation of the legislature while enacting a measure of this type for the benefit of the workmen concerned.

(d) In determining the substance of an enactment, it is not only the object that is important but also the means sought to secure the object or the manner of its administration. A statute may have a lawful object but if the methods adopted or to be adopted are unconstitutional, it is submitted, the legislation must be struck down as being in substance a breach of the Constitution.[29] It must be noted that this does not mean that legislation, constitutional either in scope or method on its face, would be struck down merely because in the administration or the execution of the law there is a possibility of unlawful actions by the administrator.[30] It is only when the very terms of the statute authorise unlawful actions that it will be struck down.

---

29 Gallagher v Lynn, [1937] A.C. 863, 869-870.

30 Alabama Power Co. v Ickes, 302 U.S. 464, (1937); Duke Power Co. v Greenwood 302 U.S. 485 (1937).

Let us assume emergency legislation is passed in Fiji granting a certain sum of money to the District Officer stationed in Suva from which payments for hurricane damage were to be made to those he thinks are proper recipients. The District Officer might act in an absolutely discriminatory manner by providing payments only to members of a certain race. The statute itself could not be impugned although the administrative actions of the District Officer might.[31] The constitutionality of the law is to be determined not with reference to the manner in which it is actually administered or will probably be administered but by the terms of the statute.

This question of determining the validity of an enactment with regard to its substance is a very important feature of constitutional interpretation. By adopting such an approach, the court is able to keep an effective check on the legislature. The legislature is prevented from doing indirectly what it could not do directly. On the other hand, the court is able to carry out the intentions of the legislature without unnecessarily taking into account irrelevant considerations.

(1) Inconsistency of Pre-Constitution Laws

Section 2 of the Constitution is very wide inasmuch as it declares the supremacy of the Constitution against not only future laws but also laws existing at the inauguration of the Constitution.[32] The Constitution speaks of "any other law" and does not limit or specify the time of enactment. It is submitted

---

31 Under s. 15 (1) (b) of the Constitution.

32 See also pp. 210 et seq., ante.

that the Constitution is deemed to have retrospective effect. It is conceded that under the ordinary rules of statutory interpretation no statute is to be construed to have retrospective operation, unless the Act expressly so provides or there is a necessary and clear implication.[33] It is submitted that there is a contrary intention in the Fiji constitutional instrument showing that the Constitution was intended to have retrospective effect. Thus section 5 (1) of the Fiji Independence Order 1970 provides:

> ...[A]nd the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970 and this Order.

Also under section 15 (5) relating to protection from discrimination, it is expressly provided that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of sub section (1) of this section -
> (a) if the law in question was in force immediately before 23rd September 1966 and has continued in force at all times since that day, ...

The terms of section 2 itself are very broad and speak of "any other law". There are no limits on its application.

If the Constitution was not intended to have retrospective effect, there would be no need for the saving clause contained in section 15 (5) of the Constitution. If the effect of the Constitution

---

33 Re Athlumney [1898] 2 Q.B. 551, 552. See also Maxwell on Interpretation of Statutes (12 ed., 1969), 215 - 227.

was intended to be prospective only, this particular saving clause would be meaningless and redundant because a law in force on 23 September 1966 would have been out of reach of the 1970 Constitution. Accordingly, the inclusion of such a clause shows clearly that the Constitution was intended to affect laws existing at the commencement of the Constitution. This also follows from section 5 of the Independence Order which shows clearly that the intention is to read all the existing laws subject to the provisions of the Constitution. The intention has been expressed that all the existing laws must be construed and applied in such a way as to bring them into conformity with the constitutional instruments.

What is the effect of pre-Constitution laws being "inconsistent" with the Constitution? It is submitted that it does not follow from what has been said earlier that any law, passed before the commencement of the Constitution and in force at that date which is inconsistent with the Constitution, is void ab initio. Such laws are void only with effect from the commencement of the Constitution. Therefore, inconsistency ought not to affect transactions or matters completed and closed or things, acts or omissions done prior to the commencement of the Constitution. The continued operation of pre-Constitution laws was expressly recognised and accepted by the Fiji Independence Order 1970:[34]

> It is hereby declared, for the avoidance of doubt, that, save as otherwise provided either expressly or by necessary implication, nothing in this Order shall be construed as affecting the continued operation of any existing law.

As has been seen, the Constitution itself makes provision for existing laws being read with such modifications and qualifications

---

34 S. 5 (5).

as make then conform with the Constitution.[35] In other words rights and liabilities accrued before the commencement of the Constitution cannot be subjected to the Constitution unless they are being enforced by unconstitutional procedures after the commencement of the Constitution.[36]

Thus in Mahendra v State of Uttar Pradesh,[37] an order was made on 13 September 1949 by the Rent Controller under the Mysore House Rent and Accommodation Control Order, 1948, alloting the vacant house of the petitioner to A and directing the petitioner to deliver the possession of the house to A. On the failure of the petitioners to deliver possession to A, possession was taken forcibly under another order of 11 April 1950. It was held that as the order of allotment was validly made before the Constitution came into force it could not be impugned on the grounds that it infringed the new Constitution of India.[38] The fact that possession was actively taken after the Constitution came into force was immaterial as the petitioner's right to possession had been lost earlier.

Similarly in Guru Datt v State of Bihar[39] the appellant's

---

35 Fiji Independence Order 1970 s. 5 (2).

36 Basu, op. cit., vol. 1, 148.

37 (1963) S.C. 1019, cited in Basu, op. cit., vol. 1, 149.

38 The Bulk of the Indian Constitution came into effect on 26 January 1950. However 15 Articles came into effect on 26 November 1949.

39 (1961) S.C. 1684, cited in Basu, op. cit., vol. 1, 150.

interest as a lessee, which would otherwise have extended up to 1954, was extinguished, on payment of compensation, by a notification of 1946 under a 1946 statute which was valid when enacted. In an action brought in 1952 the appellant challenged the constitutionality of the Act and the notification as infringing his constitutional rights. The Supreme Court rejected the claim inasmuch as the appellant's interest had been lawfully terminated before the Constitution came into effect and accordingly he could not invoke the provision of the Constitution to support his claim.

Thus it is clear that where substantive rights and liabilities have accrued prior to the Constitution, there is no question of contesting their legitimacy on constitutional grounds. However, this does not mean that in their enforcement, unconstitutional procedures can be adopted. As the Indian Supreme Court has stated:[40]

> The Constitution has no retrospective operation to invalidate that part of the proceedings that has already been gone through, but the Constitution does not permit the special procedure to stand in the way of exercise of enjoyment of post-constitutional rights and must, therefore, strike down the discriminatory procedure if it is sought to be adopted after the Constitution came into operation.

Similarily, even in relation to procedure, if the proceedings have been completed or become final before the commencement of the Constitution, it is submitted that they should be

---

40 Lachmandas v State of Bombay, (1952) S.C. 235, 245, per Das J., cited in Basu, op. cit., vol. 1, 148.

treated in the same way as accrued rights and liabilities. The Constitution cannot operate retrospectively so as to affect those proceedings. Thus in Abdul Khader v State of Mysore,[41] the appellant was tried and convicted by a special court in 1949. The Act which created the special court took away all rights of appeal and revision but provided that "the proceedings shall be submitted for review by a person nominated in this behalf by the government ... and the decision of that person shall be final". While the matter was still pending before the person so nominated, the Constitution came into force. It was held that the Constitution did not operate to invalidate the proceedings because the proceedings (except for the review) had been concluded before the commencement of the Constitution.

Therefore, it is submitted, that the Constitution of Fiji has a retrospective effect in the sense that whatever the law and whenever it was enacted, either before or after the commencement of the Constitution, it will be subject to the provisions of the Constitution. If a legislation is held to be unconstitutional, it will be invalid only in so far it affects rights or liability accruing after the commencement of the Constitution and not earlier.

The following propositions summarise the effect of the Constitution on pre-existing laws.

(1) The "inconsistent" pre-constitutional law will be valid as regards rights and liabilities accrued prior to the commencement of the Constitution.

---

41 (1953) S.C. 355, cited in Basu, op. cit., vol. 1, 148.

(2) No question of constitutionality may be raised as regards any proceeding completed before the commencement of the Constitution.

(3) Questions of constitutionality may be raised in regard to the operation of any law after the commencement of the Constitution in respect of any act, omission or thing done after the commencement of the Constitution.

(2) Inconsistency of Post-Constitution Laws

After the commencement of the Constitution, the legislative power of the Fiji Parliament, contained in section 52 of the Constitution, is stated to be "subject to the provisions of the Constitution". The Constitution, particularly the provisions contained in Chapter 2 relating to fundamental rights, includes mandatory provisions prohibiting Parliament from making laws contravening the Constitution. For example, section 15 expressly says:

> Subject to the provisions of this section
>
> (a) No law shall make any provisions that is discriminatory either of itself or in its effect ....

The intention is clear that in regard to laws passed after the commencement of the Constitution, legislative power and competence is to be determined with reference to the constitutional provisions as they stood at the time when the Act was passed.[42] Accordingly if such an enactment is found to be unconstitutional, it must

---

42 Unless of course a subsequent constitutional amendment is given a retrospective effect.

necessarily be held void ab initio. Anything done or omitted under such an enactment will be absolutely null and void. Contravention of the Constitution occurs at the very moment of enactment. In other words, the enactment is a "still-born law either wholly or partially depending upon the extent of the contravention".[43] Latham C. J., expressly acknowledged:[44]

> A pretended law made in excess of power is not and never has been a law at all. Anybody in the country is entitled to disregard it. Naturally he will feel safer if he has a decision of a court in his favour - but such a decision is not an element which produces invalidity in any law. The law is not valid until a court pronounces against it - and thereafter invalid. If it is beyond power it is invalid ab initio.

Therefore as far as the post-Constitution laws are concerned, they could not be made in contravention of the Constitution. They are invalid from their very inception. On the other hand, as has been seen, the pre-Constitution laws cannot subsist after the commencement of the Constitution[45] if they are inconsistent with it. In the case of post-Constitution laws, the Constitution strikes at the very root of the enactment but does not so in the case of pre-Constitution laws.

C. Legal Consequences of Judicial Invalidation

(1) General

We must now consider the effect of a statute being declared

---

43 Mahendra v State of Uttar Pradesh (1963) S.C. 1019, 1029.

44 South Australia v The Commonwealth (1942) 65 C.L.R. 373, 408.

45 That is on 10 October 1970.

unconstitutional by the courts. This is of greater importance where there is already a constitutional ruling on the validity or otherwise of a statute and a subsequent decision upsets the previous one.

In the United States, the Supreme Court accepted or rather assumed that a decision determining the meaning of the Constitution must be retroactive. Thus, in rejecting the argument that state legislation, held unconstitutional, might nevertheless give validity to official action taken pursuant to it before the announcement of unconstitutionality, the Supreme Court made the classic pronouncement:[46]

> An unconstitutional Act is not a law; it confers no right; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Later, however, the Supreme Court declared that there are appropriate limits to treating unconstitutional federal law "as though it had never been passed." Accordingly in a unanimous opinion by Chief Justice Hughes in Chicot County Drainage District v Baxter State Bank,[47] the court stated:

> It is quite clear, however, that such broad statements as to the effect of a determination of unconstitutionality must be taken with qualifications. The actual existence of a statute, prior to such a determination, is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various

---

46 Norton v Shelby County 118 U.S. 425, 442 (1886).

47 308 U.S. 371, 374 (1940).

> aspects, - with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attention of courts ... and it is manifest from numerous decisions that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified.

The classic formulation of the view that judicial decisions are of their nature retrospective was made by Blackstone when he stated that the duty of a court is not to "pronounce a new law, but to maintain and expound the old one".[48] It is the responsibility, or rather the duty, of a court to discover the law to be applied and to declare it as being the controlling principle in the case. In applying the law the judge merely declares what the law is and does not pronounce new law. It was a necessary consequence that the decision had retrospective effect. According to this view, decisions were merely "evidence" of what the law is. However, if a decision is subsequently overruled, then the earlier decision was "erroneous evidence". Thus a later decision which seems to change the law has not really done so at all but has only discovered the "true" rule which was always the law.[49] Dean Sulman stated:[50]

---

48 1 Blackstone, Commentaries 69 (1769), cited in Notes and Comments, "Prospective Overruling and Retroactive Application in the Federal Courts" (1961 - 1962) 71 Y.L. Rev. 907, 909.

49 For detailed treatment of this traditional view, see Notes and Comments, loc. cit., 907 et seq.

50 "Retroactive Legislation" (1954) 13 Encyc. Soc. Sci. 355, 356, cited in ibid., 908. Cf. R.H. Freeman, "The Protection Afforded Against the Retroactive Operation of an Overruling Decision" (1918) 18 Colum. L. Rev. 230.

> The doctrinal reasons are that courts do not "pass" laws, but merely apply them to specific cases; that the overruled decision was a mistake as to the law and consequently never was the law; that the overruling decision is not a new law but the application of what is and therefore had been, the true law.

From this it follows that any judicial "change" in the law must necessarily be retroactive. This "declaratory theory" of the Blackstonian approach has been subjected to much criticism.[51]

As a result of the rejection of the Blackstonian approach, there developed in the United States the notion of prospective overruling. Under this rule, it was urged that a court should recognize a duty to announce a new and better rule for future transactions whenever the court has reached the view that an old rule (appearing in precedents) is unsound, in spite of the fact that on the principle of stare decisis the court is compelled to apply the old rule to the instant case and to a transaction which had already taken place.

However, this concept of prospective overruling, even in its early stages of formal development, did not go unchallenged.[52] Support for prospective overruling was increasing. Chief Justice Cardozo expressly espoused prospective overruling in 1932. He took this view not only off the bench,[53] but also when he was the

---

51 E.g., B.H. Levy, "Realist Jurisprudence and Prospective Overruling" (1960) 109 U. Pa. L. Rev. 1.

52 E.g., R.V. Moschzisker, "Stare Decisis in Court of Last Resort" (1924) 37 Harv. L. Rev. 409, 426 - 427.

53 E.g., Address by Chief Justice Cardozo, New York State Bar Association, January 22, 1932, in 55th Report of N.Y.S.B.A. 263, cited in Levy, loc cit., 12 - 13.

Chief Justice in New York and when he was an Associate Justice of the Supreme Court of the United States. Thus in the Sunburst Case[54] Mr Justice Cardozo, for an unanimous Court, held that it is not a denial of due process for a court to adhere to a precedent in an adjudicated case and simultaneously to state its intention not to adhere to this precedent in the future. The learned justice also dealt with other variations of the same theme. He held that the court may give its ruling on an earlier decision retroactive effect, thereby making invalid what was valid when the act was done. Thus, according to him, the court has a choice whether the new rule declared by it shall operate prospectively only, or apply as to past transactions, and the choice is available - whether the subject of the new decision is common law or the construction of a statute. The choice will be determined by the juristic philosophy of the judges and their conception of the nature of law. This decision won favourable acclaim initially[55] but it received its share of attack.[56] Nevertheless, the courts in the United States generally favoured prospective overruling although with certain limitations.[57]

(2) The Position in Fiji

It is submitted that in Fiji there is no justification for

---

54 Great Northern Railway Co. v Sunburst Oil and Refining Co. 287 U.S. 358 (1932).

55 E.g., Levy, loc. cit., 17.

56 E.g., "The Effect of Overruled and Overruling Decision on Intervening Transactions" (1933 - 1934) 47 Harv. L. Rev. 1403.

57 E.g., James v United States 366 U.S 213 (1961); see also Linkletter v Walker 381 U.S. 618 (1965), Mapp v Ohio 367 U.S. 643 (1961). Generally see articles referred to in n. 63, post.

departing from the rule that judicial interpretations are retroactive. There is no room for prospective application in Fiji. As has been seen, under section 2 of the Fiji Constitution any law which is inconsistent with the Constitution shall to the extent of the inconsistency be void.[58] "Void" has been defined as:[59]

> Null; ineffectual; nugatory; having no legal force or binding effect; unable in law to support the purpose for which it was intended ....

Further,

> Void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that nothing can cure it.[60]

Also,

> The word "void" in its strict sense, means that which has no force and effect, is without legal efficacy, is incapable of being enforced by law, or has no legal or binding force.[61]

When something is void, it has no effect whatsoever. Hence the invalidity of the law would not result from the declaration of

---

58 Void ab initio in the case of post-Constitution law and void from the time of the commencement of the Constitution and in the case of pre-Constitution laws; see pp. 403 et seq., ante.

59 Black, Law Dictionary, op. cit., 1745.

60 Allis v Billings, 6 Metc., Mass, 415, 39 A.M. Dec. 744, cited in Black, op. cit., 1745.

61 Re Validation of $150,000 Serial Funding Bonds of Clarke County 187 Miss. 512, 193 So. 449, 452 cited in Black, op. cit., 1745.

the court. As has been held in Australia,[62] though a declaration from the court is perhaps necessary to determining the rights of parties, the invalidity of the statute does not depend upon it. Consequently, the unconstitutional law (in whole or in part, as the case may be) should notionally be taken to be obliterated for all intents and purposes.

Hence, it is submitted, if a statute in Fiji is held constitutional in one case and subsequently held inconsistent with the Constitution, the Court must give effect to the mandatory provision of section 2 of the Constitution and declare the statute "void to the extent of the inconsistency". The courts in Fiji have no power to lay down two rules, one to govern the instant case and another to control a similar case subsequently arising. If a statute is void, as being inconsistent with the Constitution, it is void for all purposes. Prospective application is inappropriate. It is submitted that even on policy grounds prospective overruling should not be applied in Fiji as has been done in the United States.

There are three main reasons advanced against retroactive application of overruling decisions.[63] First, retroactive over-

---

62 South Australia v The Commonwealth (1942) 65 C.L.R. 373.

63 For other views on prospective overruling, see C.E. Carpenter, "Court Decisions and the Common Law," (1917) 17 Colum. L. Rev. 593; Freeman, loc. cit., and Notes and Comments, (1962) 71 Yale L. Rev. 907; Levy, loc. cit., and Note, (1947) 60 Harv. L. Rev. 437; B.N. Cardozo, The Nature of the Judicial Process (1921) 142-169; P.J. Mishkin, "The Supreme Court-Forward" (1965) 79 Harv. L. Rev. 56; R.D. Schwartz, "Retroactivity, Reliability, and Due Process: A reply to Professor Mishkin" (1965-1966) 33 Univ. Chic. L. Rev. 719; Comments: "Linkletter, Short, and the Retroactivity Problem in Escobedo" (1965-1966) 64 Mich. L. Rev. 832; P. Bender, "The Retroactive Effect of an Overruling Constitutional Decision: Mapp v Ohio" (1962) 110 U. Pa. L. Rev. 650.

ruling worked unfair surprise on persons who had justifiably relied upon judicial decisions, thereby "frustrating the reasonable expectations of well-intentioned men".[64] Secondly, the courts in order to obviate undue hardship and anticipate the frustration of reasonable expectations, would be inhibited in overruling decisions and precedents which were outmoded and erroneous and would thereby perpetuate "wrong" legal rules. Thirdly, "adherence to the rule of retroactive overruling obscured in 'the murky shadow of Blackstonian jurisprudence' the important teachings of the Legal Realists that judges as much as legislators exercise an 'ineluctable lawcreating function' thereby discouraging open and honest analysis of what courts do in fact."[65]

On the other extreme there have been equally strong objections to prospective application of overruling decision. The main grounds for such objections have been: first, that it was a piece of judicial legislation. Secondly, that it would turn out to be ineffective as a practical matter, because parties would not institute appeals to challenge an old rule when its overruling would give them no benefit because the "new" rule would apply prospectively only. Thirdly, the attempted future ruling would be only dictum. Finally, the proposal would require " a decidedly questionable change" in the judicial system. It has been argued that courts cannot deliberately lay down two rules, one to govern the instant case and another to control similar cases subsequently arising.[66]

---

64 Notes and Comments, loc. cit., 916.

65 Ibid., 911.

66 Moschzisker, loc. cit., esp. 426 - 427.

Those who occupy the middle ground argue that a court ought to have a discretion whether an overruling decision ought to have retrospective application or be merely prospective.

> Once a court has properly before it the specific issue of retroactivity, and once it has recognized the desirability of accompanying its decision with explicit reasons, it should rely upon reasons that functionally relate to the newly-announced rule and that reflect an awareness of the operative effects of its decision.[67]

On this approach the purpose of the newly announced rule should be an important factor. In deciding whether to give a new rule retrospective effect, a court to which the issue is properly presented should first attempt to identify the purposes of the new rule. Then it should determine whether on balance those purposes will be served by general retroactive application of the new rule. Finally, it should decide whether those purposes will be best served by retroactive application of the new rule in the instant case before it.

Another factor suggested under this view is the element of surprise. Even if a court determines that the purposes underlying a new rule will on balance be served by retroactive application, it must still decide whether any further consideration would speak against retroactive application. One such consideration is the degree and quality of the surprise to the parties which would result from the change in the rule of law. This is akin to the principle of reliance referred to earlier.

It has also been suggested that, in determining whether to

---

67 Notes and Comments, loc. cit., 940.

give retroactive application to an overruling decision a court may be urged to consider the effect such retroactivity will have on the administration of the courts.[68]

In substance, the "middle view" is that when a court overrules a prior decision and announces a new rule of law by applying it to the litigants in the case or controversy before it, it should withhold any statement as to the retroactive effect of the new rule. The question of whether the new rule should be applied retroactively should not be decided until it is presented to a court as an actual case and controversy. The decision as to retroactivity should then be made, but only after a consideration of the criteria relevant to the purpose of the new rule and to the equitable and effective operation of the legal system.[69] This view seems to have gained judicial support in the famous case of Linkletter v Walker[70] where, in rejecting an application for habeas corpus, the court stated that it was "neither required to apply, nor prohibited from applying a decision retrospectively . . . ."[71] Then, having claimed a general power to refuse retroactive application in the area of constitutional adjudication, and having limited that power to cases when judgements have become final, the court set forth the threefold criteria it considered in reaching its determination thus:[72]

---

68 Ibid., 950.

69 Ibid., 951.

70 381 U.S. 618 (1965).

71 Ibid., 629.

72 Ibid., 636.

> [W]e must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp.

In the United States it seems to be well settled that the Supreme Court is "neither required to apply, nor prohibited from applying a decision retrospectively . . . ."[73] It seems that the court has a discretion whether to make application retroactive in a particular case or not and will apply the threefold criteria already mentioned in reaching its determination, namely the purpose of the rule, the reliance placed on it and the effect on the administration of justice of a retrospective application.[74]

It is submitted that a rule giving such a wide and uncontrolled discretion to the courts is open to strong criticism. It will be very difficult for the courts to lay down specific guidelines for controlling their own discretion. For example, a law may have a variety of purposes, some of which will be served by retroactive application and some of which will not. A court faced with the rules adopted in the United States may find it difficult to decide whether on balance the dominant function of the law will be furthered by retrospective application. This determination of the function of a new law will be a very difficult task, with no ultimate solution.

> All that can reasonably be asked is that a court must diligently search out and identify every reasonable purpose

---

73 See n. 71, p.419, ante.

74 Linkletter v Walker 381 U.S. 618 (1965).

> underlying the rule and wisely employ its judicial expertise in arriving at a balanced and articulated decision.[75]

However, even if a court determines that the purposes underlying a new rule will on balance be served by retroactive application, it must still decide whether further considerations, such as surprise, weigh against retroactive application. This of course depends on how much the parties have relied on the "old rule". Here too there will be differences of degree and quality of surprise. Looking at the realities of the situation, how many times would the element of surprise really be an operative factor? In most of the cases the parties will have acted without any knowledge at all of what the governing law was. As Judge Cardozo, who was an advocate of prospective overruling, stated:[76]

> The picture of the bewildered litigant lured into a course of action by the false light of a decision, only to meet ruin when the light is extinguished and the decision is overruled, is for the most part a figment of excited brains.

Hence it is submitted that in very few cases indeed will the element of surprise or reliance be a major factor. The unfairness arising from retroactive application of decisions will be more apparent than real. In any event, it will be very unrealistic to suggest that the highest court of the land would be overruling a prior decision so haphazardly and frequently as to create major surprises. The court will have to show very cogent and strong reasons for overruling its prior decisions. It is submitted

---

75 Notes and Comments, loc. cit., 944.

76 Cardozo, op. cit., 122.

that the quality of surprise would be unlikely to be as pronounced as in a case where the court departs from a prior rule embodied in a landmark decision which has been consistently adhered to and re-affirmed. In most of the cases, if not all, there are two or three overlapping and partially inconsistent lines of cases in an area. This happens frequently. A subsequent case may attempt to "settle" the law and in the process overrule some cases. It is submitted, that the court in such a situation is really settling the rule rather than stating a new rule. This is a common occurence in courts of all jurisdictions. Secondly, if the law is doubtful and a party intends to mould his conduct or enter into a transaction on the basis of the existing law the choice is his either to risk the application of one of the cases or to seek a declaratory judgement. In any event, the element of surprise cannot be said to be so pronounced as to form a basis for prospective overruling.

The suggestion that retroactivity is to be avoided because of its effect upon the administration of the courts is not seen as a serious problem. In the United States it has often been argued that retroactive effect should be denied to a new rule of criminal due process if as a result of retroactivity the courts will be faced with petitions for habeas corpus from incarcerated prisoners.[77] According to this view, there must be some indication given, either by statistics or otherwise, as to how many incarcerated prisoners would be likely to burden the courts with a habeas corpus application based on the new rule. It seems that expediency and administrative difficulties are being permitted

---

77 Griffin v Illinois 351 U.S. 12, 25 (1955).

to determine what should be the effect of a decision on the basic constitutional rights of an individual. It is submitted that the sense of injustice which compels retroactive application of the new rule in favour of convicted persons ought not to be defeated merely by a fear of overworking the judiciary or temporarily postponing hearings in other cases.

Furthermore, a litigant may not have any incentive to urge the adoption of a new rule when he knows that the benefit of the new rule, if he is successful, will be denied to him. Who wants to make the effort and incur expenses in challenging the old rule when he will not, or there is no certainty that he will benefit from the new rule even if he is successful?[78]

It is also submitted that the judicial framework of the United States is much more complex that it is in Fiji. In Fiji the judiciary consists of the Magistrates Court, the Supreme Court, the Fiji Court of Appeal, with Privy Council as the ultimate tribunal. There is no apparent reason for changing the present principle of stare decisis under which decisions have retrospective application.

In any event, since the norms expressed in constitutional

---

78 Of course, the position with respect to the so called institutional litigants may be different. The interest of an institutional litigant such as an insurance company in having a rule of law changed is not limited to the specific cases in which it seeks the change. It extends to a whole class of cases which will be governed in future by the new rule. However, such institutional litigation will be very rare compared to individual litigation: Notes and Comments, loc. cit., 945.

decisions reflect fundamental principles, it is submitted that no rights or convictions, inconsistent with these principles should be "enforced" or permitted to stand. Constitutional rights are fundamental to the whole legal system. They are part of the basic charter and immune from ordinary legislative change, as has been seen. Accordingly, if a matter is found to be unconstitutional, it should not be given effect to, irrespective of other incidental "inconveniences" that might arise.

PART FIVE

FUNDAMENTAL RIGHTS AND FREEDOMS

CHAPTER XI

THE NEED FOR FUNDAMENTAL RIGHTS AND FREEDOMS IN FIJI AND THEIR SCOPE AND APPLICATION

A. Introduction

The concept of fundamental human rights is not a recent innovation but can be traced back several centuries. English jurisprudence regards such rights as implicit in the Magna Carta, 1215, the Petition of Right, 1628, the Bill of Rights, 1688.[1] From very early times, writers have advanced and developed the theory that man has certain essential, basic, natural and inalienable rights or freedoms and that it is the function of the state to recognise these rights and freedoms. Concepts of fundamental law and natural rights are expressed in the celebrated works of Coke and Locke.[2] Since the Great Charter, the English Crown agreed not to rule the state arbitrarily but according to the laws of the land.[3]

> The ultimate effect of ... part of the Charter was to give and guarantee full protection to every human being 'who breathes English air'.[4]

However, the methods adopted to give and guarantee full protection of human rights varied from country to country. In England the protection of personal rights and freedoms has been left to the common law and ordinary legislation.

---

1 D.O. Aihe, "Fundamental Human Rights Provisions as Means of Achieving Justice in Society: The Nigerian 'Bill of Rights' ", (1973) 15 Malaya L. Rev. 39.

2 See John Locke, Two Treatises of Government (revised ed., 1965, edited by P. Laslett).

3 A.V. Dicey, The Law of the Constitution (10th ed. reprint 1965), 184.

4 Aihe, loc. cit., 40.

In other countries it was thought to be desirable to entrench these rights in such a way that they may not be vitiated, violated, tampered or interfered with by an oppressive majority in the legislature. In most countries with written constitutions, it is usual to have some basic and fundamental rights and freedoms declared in the instrument with provisions preventing any organ of the government from altering them or contravening them. Where these provisions are alterable, it can be done only by constitutional amendment invariably requiring special procedures which are usually difficult to achieve. Entrenched provisions for the protection of fundamental rights and freedoms are invariably judicially enforceable.

Fiji has followed this trend and included fundamental human rights and freedoms provisions in the Constitution.[5] These provisions are modelled on those enacted for the African countries which gained independence after 1960. It seems that the pattern was set with Nigeria in 1960 and since then the United Kingdom government has duplicated the Nigerian provisions in other constitutions with only insignificant alterations.[6] The Fiji provisions follow the same pattern.[7] The Nigerian fundamental human rights provisions have been described as "the epitome of the English Bill of Rights, 1688, and the United Nations Universal Declaration of Human Rights".[8]

---

5 Ss. 3 to 18.

6 By the end of 1964 the following countries had the Nigerian pattern of "bills of rights" in their respective constitutions: Sierra-Leone, Jamaica, Trinidad, Uganda, Kenya and Zambia.

7 Ss. 3 to 18 of the Fiji Constitution, 1970, are very similar to ss. 17 to 32 of the 1960 Constitution of Nigeria and ss. 18 to 28 of the 1963 Nigerian Republican Constitution.

8 Aihe, loc. cit., 39.

After the Second World War, legislative protection of human rights became a focus of interest almost all over the world. In the international sphere, a significant achievement was the Universal Declaration of Human Rights adopted by the United Nations in 1948. The Charter of the United Nations treats the promotion of human rights and human welfare as an essential condition of the preservation of peace. Its provisions show the determination of the member nations to work together for the realisation of fundamental rights and freedoms for all human beings throughout the world without distinction of race, sex, colour, language or religion. It seems that the prominence given to human rights in the Charter was a consequence of the appalling atrocities and degradations inflicted by the Nazi regime on the Jews and on other peoples of the occupied territories. To obviate a recurrence of such outrages provisions were adopted to make the preservation of the fundamental rights and freedoms of the individual, wherever he may be, a matter of international concern to every state. With this idea and purpose in mind the General Assembly rapidly adopted the Universal Declaration of Human Rights and the Western European countries adopted the European Convention of Human Rights, in 1950.[9] Juridically the Universal Declaration of Human Rights is devoid of binding force. The question of putting the same principles into the form of a juridically binding covenant has been kept under continual consideration by the organs of the United Nations. Regrettably the pace of progress has been slow and the future is uncertain.[10]

---

9 The same motive and idea inspired the inclusion of "crimes against humanity" in the Charters of the Nuremberg and Tokyo War Crimes Tribunals and the Genocide Convention. See generally on "Protection of Human Rights", L. Oppenheim, International Law, Vol. 1 (8th ed., 1955), 736 - 753.

10 P. Kastari, "The Constitutional Protection of Fundamental Rights in Finland" (1960) 34 Tul. L. Rev. 695.

However, with the adoption of the Universal Declaration and the European Convention, the human rights movement acquired an entirely new impetus and direction. The campaign to include fundamental human rights provisions in the sphere of internal national legislation has resulted in their incorporation in many of the numerous new constitutions framed in different parts of the world since the Second World War. How successful the operation of such provisions has been is of course another question.[11]

It is well known that there are countries which either have no written constitution or do not have elaborate fundamental rights provisions in their constitutions. Nonetheless, the fundamental rights and freedoms of individuals in such countries may still be equally effectively protected by ordinary legislation and by the courts. In relation to United Kingdom, for instance, Professor Sir Ivor Jennings stated:[12]

> In Britain we have no Bill of Rights; we merely have liberty according to law; and we think - truly, I believe - that we do the job better than any country which has a Bill of Rights or a Declaration of the Rights of Man.

Similarly in certain countries specific guarantees are ineffectual in practice because there is no judicial review or any other procedure for ensuring that the legislature will keep within the defined limits.[13] On the other hand, there are countries with fundamental rights provisions which are guaranteed constitutionally,

---

11 The Ugandan Asians were expelled despite constitutional guarantees.

12 I. Jennings, The Approach to Self-Government (1956), 20.

13 See p.447, post.

and in which any legislation contrary to the constitutional provisions is of no effect and can be declared to be so by the courts or other tribunals. Fiji is such a country.[14]

However, as there have been doubts concerning the usefulness of constitutional guarantees of fundamental rights, it will be useful to examine the position in Fiji.

B. The Need For a Constitutional Guarantee in Fiji

Traditionally, English lawyers distrusted declarations of fundamental rights. They preferred the negative approach of the common law.[15] As Professor Wheare stated:[16]

> The ideal Constitution, then, would contain few or no declarations of rights, though the ideal system of law would define and guarantee many rights. Rights cannot be declared in a Constitution except in absolute and unqualified terms, unless indeed they are so qualified as to be meaningless.

This view has been taken, it is submitted, because of the historical development of English law and the acceptance of the principle of parliamentary sovereignty and the limited powers of the courts in relation to judicial review of legislation. During the centuries of England's constitutional development, respect for and practice of basic rights have become commonplace in the English tradition.

---

14 Pp. 448 et seq., post.

15 See Generally S. A. de Smith, The New Commonwealth and Its Constitutions (1964), 162 - 170.

16 K. C. Wheare, Modern Constitutions (1951), 49.

Although England has no formal enumeration of fundamental rights of the people, it is correct to assume that:

> The safeguard of British liberty is in the good sense of the people - and in the system of representative and responsible government which has been evolved.[17]

The traditional opposition amongst the English lawyers to the inclusion of a Bill of Rights in a constitutional instrument stems not from any basic disagreement with the values which these Bills of Rights express, but rather with the elevation of those values to the status of constitutional guarantees. The English lawyer finds political manifestos out of place in a legal document.[18]

---

17 Liversidge v Anderson [1942] A. C. 206, 261, per Lord Wright. See also R. H. Jackson, The Supreme Court in the American System of Government (1955), 81:

> I am a fairly consistent reader of British newspapers. I have been repeatedly impressed with the speed and certainty with which the slightest invasion of British individual freedom or minority rights by officials of the government is picked up in Parliament, not merely by the opposition, but by the party in power, and made the subject of persistent questioning, criticism, and sometimes rebuke. There is no waiting on the theory that the judges will take care of it. In this country, on the contrary, we rarely have a political issue made of any kind of invasion of civil liberty .... The attitude seems to be, leave it to the judges .... In Great Britain, to observe civil liberties is good politics and to transgress the rights of the individual or the minority is bad politics. In the United States, I cannot say that this is so.

18 Thus the Weimar Constitution of 1919 was described by an English writer as "the best textbook so far written on modern democratic ideas: R. T. Clark, The Fall of the German Republic (1935), 81.

Where a Bill of Rights has been adopted, all organs of the government are bound to respect those rights. But the principle of parliamentary sovereignty, understood in the United Kingdom to mean that Parliament may enact legislation on any subject matter whatsoever, is inconsistent with the object of a Bill of Rights. Where there are constitutional guarantees, legislation which does not conform with the substantive provisions of the constitution is invalid. In the majority of cases, the task of deciding the legal issues, and declaring legislation unconstitutional and hence invalid, falls upon the judiciary whose powers are thereby increased. This is absolutely contrary to English tradition and parliamentary sovereignty.[19] The principle denies that there is any limit to the powers of Parliament. As a matter of legal theory, Parliament is free to make any law it pleases even though it affects the basic rights and liberties of the subject. Also, in the United Kingdom, there are two opposing views as to whether a Bill of Rights could be entrenched and protected from repeal by a later Act of Parliament.[20] This could be another factor in the traditional English view rejecting constitutional guarantees of human rights.

Paradoxically, the genesis of protection of human rights and some of the famous declarations of rights can be found in English constitutional history. The great constitutional conflicts culminated in famous constitutional charters - The Magna Carta in 1215, the Petition of Right in 1628, and the Declaration and Bill of Rights in 1689 and Act of Settlement in 1700 - involved

---

19 See pp. 188 et seq., ante.

20 See pp. 193 et seq., ante.

the liberty of the subject and its protection against arbitrary and unlawful power. Conflict resulted from the Stuart theory that the king reigned by divine right and that he was above the law. By the end of the seventeenth century the supremacy of the law was restored and had displaced any theory of royal supremacy. Since then the liberty of the subject has been secured by law. Gradually, step by step, the libertarian tradition of the common law and its system of justice secured for the Englishman his present freedom and right. In this gradual process, the common law has shown zealous concern for the private rights of the individual, including both civil and political liberties. The English courts have gone to great pains to uphold the rights of the individual against encroachments by the executive.[21]

The expectation that the courts would uphold the individual's liberties became part of each Englishman's life. Over several hundred years his freedoms grew and developed. They were accepted by the executive, the legislature and the judiciary and became an integral and indispensable part of the legal system. An English Lawyer might therefore be excused for seeing no need for constitutional guarantees of human rights. To him the protection afforded under the ordinary law is sufficient. Thus Dicey stated:[22]

---

21 In Eshugkayi Eleko v The Officer Administering the Government of Nigeria [1931] A.C. 662, 670, Lord Atkin declared:

> As the executive he can only act in pursuance of the powers given to him by law. In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the liberty of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

22 Dicey, op. cit., 199.

> The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.

This opposition to the inclusion of a Bill of Rights in a constitutional instrument is reflected in the conspicuous omission of such provisions in the constitutions of those countries which achieved self-government during the period of the Empire.[23] They were intentionally omitted.[24]

In the United Kingdom, the fundamental rights and freedoms rest on public opinion, the good sense of the people, and the strength of the common law tradition. The position in a homogeneous community like the United Kingdom is in strong contrast with the problems faced by other nations comprised of diverse elements, traditions, culture and backgrounds. Here there are

---

23 E.g., Australia, New Zealand, Canada, South Africa and India. However, there were limited guarantees provided for in the Canadian and the Australian Constitutions - such as the protection of French language in the former and acquisition of property by the Commonwealth on just terms in the latter.

24 Thus in relation to India, the Simon Commission, Cmd. 3569 (1930) 22 - 23 stated:

> Many of those who came before us have urged that the Indian constitution should contain definite guarantees for the rights of individuals in respect of the exercise of their religion and a declaration of the equal rights of all citizens. We are aware that such provisions have been inserted in many constitutions, notably in those of the European states formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless, unless there exists the will and the means to make them effective.

no deep-rooted and uniform traditions of individual liberties and freedoms.

Fiji's population is not homogeneous. In fact one of the major obstacles to the granting of independence was the racial question. Fiji is characterised by its multiracial population: substantial Indian, Fijian and European communities. There were two major obstacles to independence. First, official encouragement had been given to thinking along racial lines, the principle illustrations being the reservation of seats in the legislature for different communities, communal rolls, communal schools and other communal facilities on a social level. Secondly, in pre-independence days the relatively small European community occupied a dominant position not only politically but also economically and socially.[25] Very much later[26] the Indians, who were predominantly small scale farmers and wage-earners, began to compete with the Europeans in certain commercial fields.[27] But the indigenous Fijians made little progress in the economic and/or educational fields.

---

25 E.g., the Colonial Sugar Refining Company Ltd (a European concern) was regarded as a partner to the government. Also the other major companies (all controlled by Europeans) were: Morris Hedstrom Ltd, now the Carpenter's Group, the Union Steamship Company Ltd, Emperor Gold Mining Co. Ltd, Loloma Gold Mining Co. Ltd and others. Huge copra plantations and estate were owned by Europeans, including Garrick, Sir Henry Marks, Sir Henry Scott and Bailey. All the major industries - exporting, importing, shipping, copra, sugar, gold mining, newspaper, contractors and builders, hotels, aircrafts etc., were in European hands.

26 In late fifties and sixties.

27 E.g., in retail and wholesale trades, importing and exporting and the hotel industry and tourist industry generally.

In any multi-racial society, each race cannot help but fear that their rights may be infringed and their interests prejudiced by governmental action, particularly where one particular race is in power. This fear has been present in most of the countries which secured independence in the Commonwealth era. In Africa there were not only racial problems but also tribal and regional questions to be resolved. The Imperial government was well aware of these problems in territories with heterogeneous populations. That is why when granting a constitution to each territory from 1924 onwards it invariably reserved for itself the power to disallow bills which were contrary to the tenets of fundamental rights.[28]

In Fiji immediately prior to independence there were two major races in terms of number, the Indians and the Fijians, although the Europeans played a very effective and important role in commerce, industry and in the economic sphere generally, in the courts, in the administration and the government. The position remains the same today.[29] In terms of the effective roles played by the various races in Fiji we may conclude that there are three major races comprising the multi-racial

---

28 D.O. Aihe, "Neo-Nigerian Human Rights in Zambia: A Comparative Study with Some Countries in Africa and West Indies", (1970) 12 Journal of the Indian Law Institute, 609, 611.

29 E.g., of the 13 Cabinet Ministers (excluding the Prime Minister) seven are Fijians, three are Europeans (including the Attorney-General) and there are three Indians.

society.[30] As long as Fiji was under colonial rule, there were few fears that one race or racial group would dominate the others and encroach upon their individual rights and liberties. Although the majority of the administrators and legislators were Europeans, this was a fact which was generally accepted as being an incident of colonial rule. British rule had been tolerant and shared the same restraint and respect for the rights of minorities especially for their freedom of speech, as are embedded in the British tradition.[31] Centuries of legislative, administrative and executive traditions had a large influence on colonial rule in Fiji.[32]

In England, modern democracy was a reaction against the absolutism of an autocratic executive. For the Englishman par-

---

30 There are of course Chinese, Tongans and Samoans, but they are relatively insignificant in number. Accordingly for purposes of electoral roll, the Chinese are grouped with the Europeans on the "General Roll" and the latter two with the Fijians (s. 32 of the Constitution). The population figures according to the last census in 1966 were:

Indians	..	..	240,960
Fijians	..	..	202,176
Rotumans	..	..	5,797
Other Islanders		..	6,095
Europeans	..	..	6,590
Part Europeans		..	9,687
Chinese	..	..	5,149

31 Thus under Clause 19(9) of the Royal Instructions to the Governor of the then Colony of Fiji dated 9 February, 1929, he was instructed not to assent to Bills which were discriminatory as between Europeans and non-Europeans: he could only do so under stipulated conditions: Fiji Royal Gazette (1929), 167.

32 Perhaps one should say that British diplomacy was of paramount significance.

liamentary sovereignty was an adequate safeguard. The position of Fiji was very different. The people were inexperienced in government and had little opportunity of absorbing the traditions and methods of the British system. From the beginning, racial stresses had been a part and a fact of life in Fiji. Those stresses permeated all aspects of life; they intruded into education and the economic, social and political fields. The three major groups saw themselves as racial identities with separate schools,[33] and very little social intercourse. There was no thought of training political leaders to accept racial tolerance and adopt a multi-racial outlook. It was not until the early sixties that political parties reaching across racial boundaries came into existence.[34] Prior to this the legislature consisted of elected or nominated Indian, Fijian or European members. Even when the nuclei of political parties were formed, the general view was that the Federation Party was an Indian party and the Alliance an association of the Europeans and Fijians with a handful of the Indians to give the impression that it was a multi-racial party.[36] Rep-

---

33 This is still reflected in the names of various schools as either being an "Indian" school or a "Fijian" school but there is no law prohibiting any student of any race from attending any school.

34 There were only two parties which were fully organised as political parties - the Alliance and the Federation Party.

35 Now the National Federation Party.

36 This view is demonstrated by the result of the 1966 national elections and 1967 by-election for all the "Indian" seats. In both these elections all the Indian communal seats were won by the Federation Party. In the 1966 elections all the Fijian and European communal seats were won by the Alliance Party. All the cross-voting seats were won by the Alliance Party. As to the meaning of the terms "communal" and "cross-voting" see p.94, ante.

resentation in the legislature has been and still is on racial lines.[37]

The people of Fiji have had very little, if any, opportunity to develop a national outlook and to begin to think of the country as a whole rather than their own racial group. The cold fact must be faced that they had less than four years experience with a representative legislature before independence was secured![38]

It is against this background of a multi-racial and racially conscious society that the need in Fiji for a constitutional guarantee of fundamental rights and freedoms must be judged. With independence imminent after the 1970 Constitutional Conference,[39] it became necessary to decide how best to implant the libertarian heritage in a legislature composed of representatives of racial groups. Given the history of Fiji and the want of adequate training - the disgraceful legacy of colonial rule - and the strength of

---

37 In the House of Representatives there are 52 members of whom 22 are Indians, 22 Fijians and 8 "General". See n. 30 p.438, ante.

38 It was in 1966 that the Legislative Council became truly representative with thirty-six members elected as follows:

(a) 12 indigeneous Fijians elected by the Fijians
(b) 2 indigeneous Fijians elected by the Great Council of Chiefs.
(c) 12 Indians elected by the Indians.
(d) Ten others (who were neither Indians nor Fijians) elected by those who were neither Indians nor Fijians.

AND there were four official members: Fiji (Constitution) Order 1966, s. 43.

As to the composition of the legislative council prior to 1966, see p.85 , ante.

39 Held at Marlborough House in April 1970.

racial sentiment, it would have been naive to repose confidence in a majority in the legislature and give the Parliament in Fiji, as in the United Kingdom, full control over the liberties and freedoms of the people. There was an obvious need for constitutional guarantees against legislative action to secure what had been achieved by the common law in respect of the executive.

Disparaging remarks have been made against constitutional guarantees of rights[40] and their usefulness. However, to use the words of Professor D. V. Cowen:[41]

> No knowledgeable person has ever suggested that constitutional safeguards provide in themselves complete and indefensible security. But they do make the way of the transgressor, of the tyrant, more difficult. They are, so to speak, the outer bulwarks of defence.

Furthermore, it is submitted, in a multi-racial society like Fiji, different races have different traditions, culture, background and accordingly different values. Fundamental rights provisions[42] at least provide "a criterion or standard upon institutions, whether political or judicial [and also would] guard the liberties of all persons ....".[43] In the final analysis, the success of constitutional guarantees of rights in Fiji will depend

---

40 E.g., S.A. de Smith, op. cit., Ch. 5.

41 The Foundation of Freedom (1960), 119.

42 Constitution, s. 3 - 17.

43 Report of the Monckton Commission, Cmd. 1148 (1960).

upon the society itself. Whether the society is multi-racial or homogeneous, all the legislature can do is pass the laws to regulate the relationship of the component parts of the society at all levels - social, economic and political.[44] Wina, a Nigerian legislator, declared:[45]

> We ... consider that a Bill of Rights would be an essential part of the constitution of this country. We think that, although it has been doubted, that it will never work. It will certaintly be at least an indication of the intention of this side of the House .... Obviously a Bill of Rights is not the cure for all. A Bill of Rights is an expression of intention, and I think the most important aspect of the substance of a Bill of Rights rests with the population itself .... If such a thing as a Bill of Rights has to achieve its objective, a substantial degree of progress must be made in establishing a real sense of mutual confidence between races, between employers and employees, between district and district and tribe and tribe if it is necessary.

It is submitted that these words apply equally to Fiji. It is for the society in Fiji and its component elements either to make full use of the provisions for fundamental rights and freedoms and to perpetuate their intentions or to nullify their effect.

In Fiji, no doubt, there will be times when it will be necessary to pass legislation encroaching upon the basic freedoms and liberties of the individual. To do so it will be necessary to secure the required three-quarters majority.[46] If such legislation is seen to be for the benefit of the country as a whole, then

---

44 Aihe, loc. cit., 612.

45 45 Northern Rhodesia (Legislative Council) Hansard No. 106, 1963 Cols. 260-261, cited in Aihe, loc. cit., 612.

46 Constitution, s. 67; see pp. 207 et seq., ante.

no doubt the required majority will be secured. However, if the legislation represented an attempt by one major racial group to impose its will on another group, it would be very difficult indeed to secure its passage when regard is had to the representation of the several races in the House of Representatives. This provides an innate check on legislation aimed at a racial group.

The fundamental rights guaranteed by the Constitution are not new rights. All the rights and freedoms enumerated in the Fiji Constitution exist at common law.[47] The Constitution declares and preserves these rights from encroachment by ordinary legislative process. Even if the entrenchment of these rights were removed, the rights would still exist as long as common law remains part of the law of Fiji. No doubt they would not then enjoy the special position they do now. The legislature would then be at liberty, as in England, to enact legislation in derogation of the fundamental freedoms and liberties of the subject. Only the executive would be limited, as in England, in its actions against the liberty of the subject. Unless there was legislative provision to the contrary, the executive would not be able to encroach upon the liberty of a subject.[48]

It is submitted that the provisions pertaining to fundamental rights and freedoms of the individual are clearly needed in Fiji. They were not put in as a matter of course or because of the modern pattern set since the Nigerian Constitution of 1960. The various factors already discussed necessitated such provisions. It is submitted that the view of the Minorities Commissions

---

47 See pp. 450 et seq., post.

48 See n. 21 p. 434, ante.

supporting a Nigerian Bill of Rights is as much applicable to Fiji as Nigeria.

> Provisions of this kind in the constitution are difficult to enforce and sometimes difficult to interpret. Nevertheless we think that they should be inserted. Their presence defines beliefs widespread among democratic countries and provides a standard to which appeal may be made by those whose rights are infringed. A government determined to abandon democratic courses will find ways of violating them. But they are of great value in preventing a steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights.[49]

Thus the object behind the inclusion of constitutional guarantees of rights is the establishment of a system of government in which absolute power is not vested in the hands of any one organ of the state. Even the Founding Fathers of the American Constitution had the painful experience of even a representative body being tyrannical. The Americans had learnt of the frailty and weakness of human nature when the same Parliament which had forced Charles I to sign the Petition of Right in 1628, acknowledging that no tax could be levied without the consent of Parliament, in 1765 and subsequent years insisted on taxing the colonies without this right to representation. While the English people in their fight for freedom from absolutism and autocracy stopped with the establishment of the sovereignty of Parliament and the supremacy of the law, Americans went further and placed the Constitution above the legislature itself. They felt it was the restraint of this paramount law which could save them from autocracy. They wanted to prevent dictatorship and despotism. Thus

---

49 Cmd. 505 (1958), 95.

Miller J. stated:[50]

> It must be conceded that they are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is nonetheless a despotism.

The experiences of various countries show that the application of the Rule of Law has not been altogether satisfactory. In several countries it has not been administered evenly. Legislation trampling upon the freedoms and liberties of subjects has been passed in countries which had adopted the concept of the sovereignty of Parliament. There is therefore a need to protect the fundamental rights and freedoms not only from the executive but also from the legislature. Jackson J. aptly said:[51]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

A constitutional guarantee of rights was needed in Fiji to remove from a bare majority in the legislature the right to encroach upon the liberties and freedoms of the individual. No

---

50 Citizens Savings and Loan Association v Topeka (1874) 20 Wall, 655, 662.

51 Board of Education v Barnette, 319 U.S. 624, 638 (1943).

doubt in some respects there will be inconveniences caused to the government of the day in its "useful exertions". In the words of Thomas Jefferson,[52]

> The inconveniences of the Declaration are that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate, and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable: they are in constant progression from bad to worse. The executive in our governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread. . . .

However, these are temporary inconveniences and if a measure is in fact absolutely essential for the benefit of the nation, the government is likely to muster the required majority to enact it. The constitutional guarantees in Fiji are not absolute as in America. The Fiji provisions are flexible, as is about to be seen.

C. The Scope and Extent of Application of Fundamental Rights and Freedoms in Fiji

(1) General

As a general rule there are three ways of providing for fundamental rights and freedoms in a constitution.[53] First, they may be included as a declaration of objectives in the preamble, or in a substantive provision, or in the oath of office to be taken by the head of State. In such cases, the provisions are only declar-

---

52 The Papers of Thomas Jefferson, vol. 14, 60, cited in B. Schwartz, The Bill of Rights: A Documentary History (1971) 621.

53 B.O. Nwabueze, Constitutionalism in the Emergent States (1973), 42.

ations of what the state should do. They confer no rights on citizens. Such provisions are not justiciable but merely serve as a form of principles of policy.[54] Thus Article 6 of the Ivory Coast Constitution provided that the state

> shall ensure the equality of all citizens before the law, without distinction of race, religion and social conditions.

In Ghana the Republican Constitution of 1960 required the President, immediately after his assumption of office, solemnly to declare his adherence to the protection of certain human rights, including freedom from discrimination, freedom of speech, religion and assembly and the right of property. These have been held not to be justiciable rights.[55]

Secondly, the provision may take the form of a guarantee of rights in the preamble of the constitution. Thus the preamble not only recites but also guarantees the rights. The French adopted this form in the Constitution of both the Fourth and Fifth Republics. The Constitution of the Central African Republic has a preamble of three pages. It proclaims the state's attachment to the rights of man and its recognition of "the existence of inviolable and inalienable rights of man as the basis of any human society, of peace and of justice in the world," and goes on to guarantee a list of individual human rights. It is submitted that if the ordinary principles of statutory interpretation are applied,

---

54 Nwabueze, op. cit., 42.

55 Re Akoto, 1, civil appeal No. 42/61, cited in Nwabueze, op. cit., 42. See also Tanzania Constitution and Pakistan Constitution of 1962.

these provisions cannot really guarantee to a subject any of the rights enumerated inasmuch as the preamble does not form part of the statute. It may be that the state in passing legislation would be expected to adhere to such principles and follow them as a matter of policy but not as a matter of law. As Professor Nwabueze has rightly, it is submitted, pointed out,[56] "civil liberties guaranteed in a preamble can therefore have no more than a moral force."

The third method of providing constitutional guarantees of fundamental rights is to include them in the substantive provisions of the constitution. In most cases, the provisions so made are justiciable. In many constitutions the provisions are entrenched in order to preclude their amendment or repeal by ordinary process of legislation.

This last method is the one employed in Fiji. Chapter II of the Fiji Constitution sets out the various rights and freedoms which are specifically granted. They are:

(a) The right to life.[57]

(b) The right to liberty and security of person.[58]

(c) Freedom from slavery and forced labour.[59]

(d) Freedom from torture and from inhuman treatment or punishment.[60]

---

56 Nwabueze, op. cit., 43.

57 Constitution, s. 4.

58 Ibid., s. 5.

59 Ibid., s. 6.

60 Ibid., s. 7.

(e) The right of property.[61]

(f) The right to privacy of home and other property.[62]

(g) The right of protection of law and the right of a fair trial.[63]

(h) Freedom of thought, conscience and religion.[64]

(i) Freedom of expression.[65]

(j) Freedom of assembly and association.[66]

(k) Freedom of movement.[67]

(l) Protection from discrimination.[68]

(m) The right to an effective remedy if one's rights are violated.[69]

The above rights and freedoms are, of course, defined in considerable detail. In most cases the first sentence or paragraph of the section concerned contains a general affirmation of the right and the following paragraphs set out the limitations to which that right may be subjected. For instance, the right to liberty can be restricted after conviction by a competent court or

---

61 Ibid., s. 8.

62 Ibid., s. 9.

63 Ibid., s. 10.

64 Ibid., s. 11.

65 Ibid., s. 12.

66 Ibid., s. 13.

67 Ibid., s. 14.

68 Ibid., s. 15.

69 Ibid., s. 17.

in the event of a lawful arrest or detention. The limitations are carefully formulated and, in general, permitted only when they are prescribed by law and reasonably justifiable in a democratic society in the public interest.[70]

In determining the scope of fundamental rights in Fiji, two matters stand out.

(a) First, the provisions of the Constitution dealing with the fundamental rights seem, for the most part, to make little change in the existing law and to be mostly declaratory of the existing law.

(b) Secondly, the precise scope and effect of fundamental rights will depend not only upon the range of the rights guaranteed but on the qualifications, provisoes and exceptions contained in the respective provisions relating to various rights and other general limitations.

(2) The Fundamental Rights and the Existing Law

As already mentioned,[71] in Fiji the constitutional guarantee of rights does not create any new right. The rights enumerated existed immediately prior to the coming into force of the Constitution. Thus section 4 of the Constitution which in sub-section (1) provides that no person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted, goes on to provide

---

70 This aspect is treated in greater detail elsewhere. See pp.453 et seq., post.

71 See p. 443, ante.

exceptions in sub-section (2). They are,

(a) Self defence as regards person or property.

(b) Lawful arrest.

(c) Suppression of riots etc.

(d) Prevention of commission of a crime.

All four were already law.[72]

Other provisions ofthe Constitution similarly reiterate the existing law.[73] The rules pertaining to a criminal trial and arrests - fair hearing, the right to defend oneself, the double jeopardy rule, and the right of an accused person to refuse to give evidence at the trial - are all familiar to an English lawyer.

It is submitted that all that the Constitution did was to declare and preserve existing rights from encroachment by ordinary legislative process. Even without constitutional protection, these rights would still exist as long as the common law remains part of the law of the land in Fiji.[74]

The fact that these fundamental rights have been specified and enumerated does not, it is submitted, mean that the list is exhaustive of the rights of the subject or that the common law

---

72 The Penal Code, Chap. 11 of the Laws of Fiji, ss. 17, 18, 83 and 419 ; the Criminal Procedure Code, Chap. 14 of the Laws of Fiji, ss. 52 - 55.

73 See ss. 24 - 43 of the Penal Code; ss. 3, 18, 22, 23 and 24 of the Supreme Court Ordinance; The Court of Appeal Ordinance (Chap. 8 of the Laws of Fiji); the Magistrates' Courts Ordinance (Chap. 10 of the Laws of Fiji); and the Criminal Procedure Code.

74 See p. 443 , ante.

has been displaed. Section 5 (1) of the Fiji Independence Order 1970 provides:

> The revocation of the existing Orders shall be without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders; and the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970 and this Order.

"Existing laws" include ordinances in force in the Dominion immediately before independence.[75] One such ordinance is the Supreme Court Ordinance,[76] section 22 (1) of which provides:

> The common law, the rules of equity and the statutes of general application which were in force in England ... on the second day of January, 1875 shall be in force within Fiji ...

Accordingly, it is submitted that the common law rights which have not been specified in the Constitution continue to apply subject to "such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970" and the Fiji Independence Order.[77]

---

75 S. 2 of the Fiji Independence Order 1970.

76 Chap. 9 of the Laws of Fiji.

77 Cf. the American provision which expressly says that "the enumeration of the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." : IXth Amendment of the Constitution of U.S.A.

(3) The Limits of Constitutional Guarantee

It is submitted that there are four major qualifications which have direct impact on the scope and application of the fundamental rights provisions in the Fiji Constitution. They are:

(a) The phrase "reasonably justifiable in a democratic society".

(b) The apparent limitation under section 15 (5) relating to protection from discrimination.

(c) Derogations from fundamental rights provisions during emergencies.

(d) Many areas of social behaviour will raise issues that would conventionally be classed as fundamental rights but the Constitution may have no application.

(a) "Reasonably Justifiable in a Democratic Society"

It may be safely generalised that no fundamental human right can be granted in absolute terms. In securing or granting such rights, the interests and rights of each individual on the one hand and the society and nation on the other have to be considered. Thus in the protection of the freedom of speech of one individual, the protection of the reputation of another individual, or the interests of the public order, have to be considered. It is highly unlikely that any of the guarantees in a Bill of Rights in any country, unqualified as their terms seem to be, will ever be judicially interpreted as absolute. Considerations of public order and rights of other individuals must necessarily limit and condition the actual exercise of the verbally unqualified prescriptions of the Bill of Rights. The task of judicially determining whether violation of a

constitutionally sanctioned interest has taken place necessitates the balancing of such interests.[78] Thus a statement of the fundamental rights of subjects must be subject to qualifications and exceptions. Even in a country like the United States, where the constitution guarantees the fundamental rights in absolute terms, they cannot be enjoyed without qualification. Justice Brandies stated:[79]

> But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the state from destruction or from serious injury, political, economical or moral.

The paramount question is where to draw the line between the fundamental rights and their qualifications. As has been stated,[80]

> the problem is where to draw [the line] so as to leave ample room for the enjoyment of individual rights and at the same time make it possible for the government to discharge its obligations towards the society and the political community itself. This would involve a delicate balancing of objectives.

---

78 Cf. the "clear and present danger" test enunciated by Justice Holmes in Schneck v United States 249 U.S. 47, 52 (1919), necessarily presupposes that any absolutist claims to free speech must be qualified by consideration of countervailing interests in national security. See also Francis v Chief of Police [1973] A.C. 761.

79 Whitney v California 274 U.S. 357, 373 (1926); and Schneck v United States, supra.

80 Nwabueze, op. cit., 44.

In Fiji, the answer depends upon the construction to be placed on the phrase "reasonably justifiable in a democratic society". This phrase features prominently in many of the fundamental rights provisions of the Constitution.[81] Encroachment upon the basic rights is allowed, in most cases, if it is "reasonably justifiable in a democratic society".

This places a heavy burden on the judiciary to evolve a rational synthesis between individual freedom on the one hand and claims for the public good on the other hand. The courts will have to ascertain the limits within which the legislature should be allowed to interfere with individual liberties and the weight to be attached to the public interest. This is an unenviable task.

The words "reasonably justifiable in a democratic society" are manifestly vague and flexible. What are the universally acceptable minimum standards of a democratic society? There is, it is submitted, no formula or definition of such minimum standards. It seems that one has to depend upon what is commonly accepted in a democratic society in practice rather than rely on any specific definition. Although the basic concept of democracy is well understood, the nature and form of "democracy" varies from one country to another. Thus in the United States a democratic society has been said to be[82]

> a free society in which government is based upon the

---

81 E.g., ss. 8(5), 9(2), 11(6), 12(2), 14(3)(b) and 15(3), dealing with deprivation of property, privacy of home and other property, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement and protection from discrimination respectively.

82 Speiser v Randell 357 U.S. 513, (1958).

consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.

It is submitted that it is in this context that we may view the phrase "democratic society". In any event, the phrase "democratic society" cannot be seen in isolation from the phrase "reasonably justifiable". The first will be better understood after determining the meaning of the latter.

"Reasonably justifiable" also seems to be a very wide and flexible phrase, especially when it is compared with the rather restrictive phrase used in the European Convention of Human Rights, "necessary in a democratic society". It has been rightly said,[83] as will be seen presently, that under the European Convention "the standard for laws restricting the guaranteed rights and freedoms is more exacting".

"Justifiable" connotes something which is capable of being shown to be just, right, proper, reasonable or warranted, something for which adequate grounds can be shown,[84] or something which is defensible.[85]

"Necessary" on the other hand connotes something which is needful, requisite, that cannot be done without, an essential.[86]

---

83 S.A. de Smith, op. cit., 188.

84 The Shorter Oxford English Dictionary (3rd ed., 1964), 1076.

85 Black's Law Dictionary (Revised 4th ed., 1968), 1004.

86 Shorter Oxford English Dictionary, op. cit., 1315.

Accordingly, it is submitted that the term "justifiable" is of wider application and connotation than is the term "necessary". Quite clearly the latter is much more restrictive than the former. A measure may be useful or just but it may not be necessary; it would be held valid as "justifiable" but not valid as "necessary". But what is "necessary" would certainly always be "justifiable".

However, it is submitted, the wide connotation of the term "justifiable" has been restricted to some extent by the word "reasonably". That is, to derogate from the fundamental rights provisions the measure must not only be justifiable but it must be "reasonably" so. Hence the courts in Fiji would be entitled, even obliged, to see that such a measure fulfils both the qualifications. What of the cases? This question as to what is reasonably justifiable in a democratic society has been raised in three cases in Africa [87] - two in Nigeria [88] and one in Zambia. [89]

In Chike Obi v Director of Public Prosecutions [90] the defendant, a member of the House of Representatives and the leader

---

87 The provisions relating to fundamental rights in Fiji are similar to those in Nigeria and Zambia, as they stood at the time of the relevant cases.

88 Cheranci v Cheranci (1960) N. R. N. L. R. 24 and Chike Obi v Director of Public Prosecutions [1961] All N. L. R. 186.

89 Patel v Attorney-General for Zambia H P/ Const. /Ref. 1/1968.

90 Supra.

of the Dynamic Party, was charged with sedition under section 50 (1) (c) of the Nigerian Criminal Code. It was alleged that he had distributed a seditious pamphlet with the title:"The People: Facts that You Must Know." The seditious part was "Down with the Enemies of the people, the Exploiters of the Weak and the Oppressors of the Poor...." The substance of the publication alleged that ministers were interested only in benefiting themselves and not in the well-being of the people as a whole.

The question before the Supreme Court was whether the criminal code provision relating to sedition was contrary to section 24 of the Constitution relating to freedom of expression (a provision which is substantially the same as section 12 of the Fiji Constitution.) The defence contended that:[91]

> Any law which punishes a person for making a statement which brings a Government into discredit or ridicule or creates disaffection against the Government irrespective of any repercussions on public order or security is not a law which is reasonably justifiable in a democratic society.

The court, however, held that to contend that, under section 24 of the Constitution a law is only valid if the acts prohibited by it are in every case likely to lead directly to disorder is to take too narrow a view of the constitutional provision. It is justifiable to take reasonable precautions to preserve public order and this may involve the prohibition of acts which, if unchecked or unrestrained, might lead to disorder, even though those acts would not do so directly. It was further held that the Supreme Court must be the arbiter of whether or not any particular law is justifiable. Thus Brett F. J. stated:[92]

---

91 Ibid., 91.

92 Ibid., 97.

> Nevertheless, it is right that the courts should remember that their function is to decide whether a restriction is reasonably justifiable in a democratic society, not to impose their own views of what the law ought to be.

His Lordship continued:[93]

> [T]he point which I would make is that we have to approach sections 50 and 51 of the Criminal Code not merely as part of the legacy of a former regime but as something ... which ... has been considered reasonably justifiable in a democratic society by the majority of the elected representatives of the people of the Federation. This does not in any way relieve the Court of the duty to judge for itself, but it is among the matters to be taken into consideration.

In Patel v Attorney-General for Zambia,[94] the accused was charged with contravening the provisions of the Exchange Control Regulations, 1965, by attempting to export Zambian currency to London. Evidence was adduced that a customs officer searched and seized some postal packets belonging to the accused. The defence contended that the customs officer's action violated the human rights of the appellant. The following questions were raised for determination by the High Court.

(a) Did the opening, examination and seizure of the postal articles constitute a contravention of the applicant's right to privacy of property as guaranteed by section 19 of the constitution or a contravention of the applicant's freedom of expression as guaranteed by section 22 of the constitution?

---

93 Ibid., 98.

94 Supra.

(b) Did the opening, examination and seizure of the postal articles constitute a contravention of the applicant's right to protection from deprivation of property as guaranteed by section 18 of the constitution?

In Zambia, as in Fiji, there are provisions for derogation from fundamental rights. A law may be made in the interest of defence, public safety, public morality, public health, and public order, despite the constitutional safeguards for fundamental rights if the law is reasonably justifiable in a democratic society.

The court, before elaborating on the substantive part of the issue, examined the conditions precedent to the exercise of the powers conferred on an "authorised officer" by Regulation 35 of the Exchange Control Regulations. That Regulation states that the "authorised officer" must have reasonable suspicion that a postal article contains foreign currency or that Zambian currency is being exported or imported in contravention of the Regulations. Was reasonableness to be judged by the objective or the subjective test? The court adopted the objective test. It seems that the court was influenced by the status[95] of the person upon whom power is conferred when it said that "even the majority in Liversidge v Anderson applies the subjective test only to the Secretaries of State".[96]

---

95 Cf. Ekundare v Governor in Council [1961] All N. L. R. 159; Awolowo v Federal Minister of Internal Affairs [1962] N. L. R. 177. These cases seem to suggest that the courts would not invalidate the executive actions of a head of state, state governor or even a Minister of State; Aihe, loc. cit., 618.

96 As cited in Aihe, loc. cit., 618.

Having considered this preliminary question, the court answered the first question in the negative inasmuch as the opening, examination and seizure was held to be "reasonably required" for the purpose beneficial to the community. The state argued that the Exchange Control Act and Regulations were necessary or expedient in the interest of public safety, but the court disagreed as there was no nexus between the immediate danger to public safety and the regulation of national economy. However, the court did hold that the taking possession of the postal articles, was expedient in order to secure the development of the nation's financial resources for a purpose beneficial to the communtiy. Accordingly, the court answered the second question in the negative also.

In relation to the question as to what is reasonably justifiable in a democratic society, the defence argued that neither Regulation 35 nor a search conducted under it was reasonably justifiable in a democratic society. The State contended on the contrary, that as long as Zambia continued to be a democracy, that which is reasonably required in Zambia must be reasonably justifiable in a democratic society. However, the court held that what is reasonably justifiable in a democratic society must be viewed objectively and not subjectively.

The interpretation placed on the law and its relation to the fundamental rights in this case exemplifies the scope of the wide operation of the phrase "reasonably justifiable" as opposed to "reasonably necessary". In this case the court found that a measure may not be necessary but at the same time it may be expedient and hence justifiable. This allows wider scope for judicial review of a measure as to whether it is necessary, than

as to whether it is justifiable. Hence a measure may be justifiable either because it is necessary or because it is expedient. Consequently, "reasonably necessary" is more restrictive than "reasonably justifiable".

In Cheranci v Cheranci [97] it was sought to impugn legislation which prohibited persons under the age of 15 years from taking part in any "political activity" as defined. The High Court of the Northern Region of Nigeria held that there is a presumption that the legislature has acted constitutionally and that the laws which it has passed are necessary and reasonably justifiable. The burden of proof rests on the person who alleges that the legislature has infringed a fundamental human right. The court further concluded that for a restriction upon a fundamental human right to be considered reasonably justifiable:

(i) it must be necessary in the field in question, e.g. public safety, public order, public morality etc; and

(ii) it must not be excessive or out of proportion to the object sought.

It is submitted, however, that the High Court's strictures of "not excessive or out of proportion", if it was not meant to incorporate, must be extended to include "not arbitrary". [98] As Professor Nwabueze points out, correctly, it is submitted, [99]

---

97 (1960) N.R.N. L.R. 24.

98 Nwabueze, op. cit., 46.

99 Idem.

> [t]his is important as it is with the arbitrariness of discretion that the concept of constitutionalism is essentially concerned. It may be said therefore, that the phrase "reasonably justifiable" imports the aspect of the American concept of due process which has enabled the U.S. Supreme Court to strike down any law considered to have unreasonably or arbitrarily interfered with liberty.

After all, the whole idea of protection of fundamental rights is against not only arbitrary actions of the executive but also against arbitrary actions of the legislature. Sovereignty of Parliament, as interpreted in English jurisprudence, allows a Parliament to pass any legislation on any topic whatsoever even if it means curtailing the liberty of the subject. It is such a possibility that the Fiji Constitution, or any constitution for that matter which has a Bill of Rights, seeks to exclude. Thus it is submitted, to be reasonably justifiable in a democratic society, a restriction on the fundamental right must not be arbitrary. This conclusion is supported by the use of the term "reasonably". A law, to be valid, must not only be justifiable but reasonably so. This requirement of reasonableness is incompatible with arbitrariness.

In assessing the reasonableness of challenged legislation and hence its constitutionality, two approaches can be taken. The first approach involves a presumption that a legislative act is valid. Under this approach, it is assumed that if a state of facts could exist that would justify the legislation, it must also be assumed that those facts actually did exist when the statute under consideration was passed. On the contrary, if no circumstances could exist to justify the legislation, it must be declared void as being in excess of the legislative power. [1]

---

1 Munn v People of Illinois 94 U.S. 113, 132 (1875). See also Powell v Pennsylvania 127 U.S. 678. (1887) and United States v Carolene Products Co.; 304 U.S. 144 (1937).

The second approach requires special justification for encroaching upon or making new inroads into the freedoms and liberties of subject, secured by the constitution. In other words, the court proceeds upon the basis that fundamental rights cannot be violated unless it can be shown that the legislation is reasonably justifiable.[2] The court puts itself in the same position as the legislature when the legislation was adopted. It balances the apparent detriment of the measure from the point of view of the fundamental rights of the individual as against the anticipated benefits from the point of view of the public as stated in the Constitution be it public safety, public order, public health, etc. It is only when the scale is tipped in favour of the public purpose concerned that the measure will be upheld as constitutioml. Until that happens, the measure will be held unconstitutional. On this basis the United States Supreme Court, in 1923, set aside as "unreasonable" and "arbitrary" an Act of Congress establishing a minimum wage for women industrially employed in the District of Columbia.[3]

As far as Fiji is concerned, there are no decided precedents as to which approach should be taken. However, as has been seen, in Nigeria, which has very similar provisions to those included in the Fiji Constitution, it has been held that there is a presumption of the validity of legislation as being constitutional.[4]

---

2 Adkins v Children's Hospital of the District of Columbia 261 U.S. 525 (1922). However, the decision on the constitutionality of the legislation in this case was overruled by West Coast Hotel v Parrish 300 U.S. 379 (1936).

3 Adkins, case, supra.

4 Cheranci v Cheranci (1960) N.R.N.L.R. 24. However, as to fuller treatment of this subject see Ch. IX pp.325 et seq., ante.

Further it was held in the same Nigerian case that the burden of proof rests on the party alleging unconstitutionality. In view of the similarity in the constitutional provisions, it seems that the Fiji courts would be bound to adopt the Nigerian approach. Almost all the sections on fundamental rights containing exceptions and qualifications have the provision,

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section ... except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

It is submitted that this provision clearly presupposes the validity of the measure and of any action or thing done thereunder. A presumption in favour of validity is implied. The provision in substance states that to render the measure inconsistent with the fundamental right protected by the relevant section of the Constitution, it must be "shown" not to be reasonably justifiable in a democratic society. Also, the provision begins with the supposition of validity inasmuch as it commences by stating "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention" of the fundamental right unless it is "shown" not to be reasonably justifiable. Quite clearly the onus rests on the person challenging the validity of the legislation or action.[5]

This is a very unfortunate state of affairs. It undermines

---

5 However, there may be circumstances when the onus may shift; see Ch. IX, ante, relating to constitutional interpretations and particularly pp. 328 et seq., ante.

the real value of the fundamental rights provisions which were intended to protect the individual from the arbitrary actions of the government - executive and legislature. Surely, the State should have the onus of proving that a certain state of affairs exists justifying the invoking of the provisoes, exceptions and qualifications of the fundamental rights provisions. As the position stands today, the impression is given that the fundamental right is the exception rather than the rule.

Having seen the various aspects of the phrase "reasonably justifiable in a democratic society" in isolation, one comes to the question of paramount practical importance: what standards, social philosophy and scale of values should be used by the courts in Fiji? It is submitted that the courts will have to determine for themselves what is reasonable in all the circumstances of a given case. There cannot really be a common standard applicable in all circumstances. But there may be some guiding principles. The Supreme Court of India stated:[6]

> In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the judges participating in the decision should play an important part, and the limit to their interference with legislative judgement can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their own way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

Ultimately, the court will have to rely on its own judgement.

---

6 State of Madras v Row (1952) S.C.R. 597, 607.

It does not necessarily follow that because a legislature has passed an enactment every provision thereof is reasonably justifiable in a democratic society. The court will be bound to view and assess the enactment objectively and not subjectively.[7] No doubt the judiciary will respect the legislative determination in matters involving legislative policy, the desirability of the measure or its expediency. It is the function of the court to determine the constitutional validity of a statute not to sit in judgement on the wisdom of the legislature.[8] The courts in Fiji have been appointed as sentinels by the Constitution to watch over the fundamental rights secured to the people of Fiji and to guard against any violation of their rights by the State. If the courts are to be effective and realistic guardians, they must not only act with self-restraint and due respect for the judgement of the legislature, but they must also use their own impartial judgement without undue regard to the claims of either the citizen or the State. In so doing, they must have some standard by which to judge whether or not any legislative provision is reasonably justifiable.

The Fiji Constitution has been in operation for only five years and there has been insufficient time to establish these standards. Hence it is necessary to draw upon the experience of other countries where similar problems have arisen - such as America, India and the African countries.[9]

---

7 Patel v Attorney-General of Zambia H P/ Const. / Ref. 1/1968.

8 D.D. Basu, Commentary on the Constitution of India (5th ed., 1965), Vol. 1, 209-216.

9 See Cheranci v Cheranci (1960) N.R.N.L.R. 24.

One thing is clear: the meaning and operation of the fundamental rights provisions are going to change as society changes. Thus a reasonably close correlation between the society and law must ensue.[10] Changes in society include not merely social changes. Ohter factors such as economic conditions and the needs of the society in the broad context will also be relevant. The content and scope of the fundamental rights provisions will accord with the society's own "libertarian impulses".[11] This may best be illustrated by two sets of examples in the United States.

In Plessy v Ferguson,[12] The Supreme Court sustained a Louisiana statute of 1890 requiring "equal but separate accommodations" for white and negro railway passengers. However, in Brown v Board of Education[13] in 1954, segregation (even where equal facilities were provided) was held to be unconstitutional.

Similarly in 1922 in Adkins v Children's Hospital of the District of Columbia,[14] the Supreme Court struck down as unconstitutional an Act of Congress establishing a minimum wage

---

10 E. McWhinney, "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (1959) 37 Can. Bar Rev. 16, 27.

11 Idem.

12 163 U.S. 537 (1896).

13 347 U.S. 483 (1954).

14 261 U.S. 525 (1922).

for women industrially employed in the District of Columbia. However, in 1936 in West Coast Hotel Co. v Parrish,[15] the opposite result was reached. In coming to its conclusion the court paid regard to the circumstances then prevailing - particularly the economic position. Thus, in delivering the judgement of the Court, Chief Justice Hughes stated:[16]

> There is an additional and compelling consideration which recent economic experience has brought into a strong light .... We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved .... The State of Washington has encountered the same social problem that is present elsewhere.

However, it is submitted, this is not to say that the relationship between the social outlook and the actions of the court would be virtually automatic. It will depend upon weighing the intent of the "positive law and the societal facts."[17] It is in this field that the courts can be expected to play a creative role. This is where the absolute independence and the strength of the judiciary will be needed most. It is hoped that the courts in Fiji will be able to play a role within the framework of the Constitution with professional courage, viewing the situation at hand dispassionately, uncoloured by partisan attitudes. It has been said that:[18]

> The court is a dependent institution, and for this reason, if the judges wish to set themselves against the course of society as a whole or for that matter even of political authority in the executive - legislative arenas of govern-

---

15 300 U.S. 379 (1936).

16 Ibid., 399.

17 McWhinney, loc. cit., 29.

18 Idem.

> ment, theirs must tend to be a Fabian, delaying role rather than to involve the employment of direct, frontal assault tactics.

The courts ought not to become too involved with policy decisions. This could lead the judiciary into disrepute. The judiciary in Fiji will play a decisive role in the implementation and elaboration of the fundamental rights provisions. This is not only necessary and inevitable but highly desirable. It is hoped that the courts will not pay undue regard to the claims of either the citizen or of the State. They should be guided by the stand taken by the Supreme Court of United States in the New Deal era and the Supreme Court of India in the early years of independence.

(b) Apparent Limitation under Section 15 (5)

Prima facie, it seems, the effect of section 15 (1) [19] of the Constitution has been significantly affected by sub-section 5 of the same section which provides that:

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of

---

19 Section 15 (1) provides:

> Subject to the provisions of this section -
>
> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
>
> (b) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

subsection (1) of this section -

(a) if the law in question was in force immediately before 23rd September 1966 and has continued in force at all times since that day; or

(b) to the extent that it repeals and re-enacts any provision which has been contained in any written law at all times since immediately before that day.

The date, 23 September 1966, is not an arbitrary date; it was then that the 1966 Constitution of Fiji came into force and effect. The 1966 Constitution gave Fiji its first "Bill of Rights". The provisions of that "Bill of Rights" were very similar, if not almost identical in substance, to the current 1970 Constitution.

Practically all the legislation which is basic to the administration of the country had been enacted well before the relevant date. The legislation includes the administration of justice, and ranges over the entire area of state activity.[20] Prima facie, if any person acts in a discriminatory manner in the performance of his functions as a public officer by virtue of the provisions of any of the ordinances adopted before 1966 the person affected cannot be given redress by the Supreme Court inasmuch as subsection

---

20 E.g., Banking, Broadcasting, Cocoanut Industry, Commission of Inquiry, Companies, Co-operative Societies, Courts, Crown Lands, Crown Acquisition of Lands, Currency, Customs, Education, Electricity, Factories, Fiji Development Bank, Fiji Military Forces, Fijian Affairs, Finance (Control and Management), Fisheries, Forests, Fruit Export and Marketing, Gold Dealers, Harbours, Hotels Aid, Immigration, Income Tax, Industrial Association, Land Development, Legal Practitioners, Licence, Liquor, Insurance, Merchant Shipping, Marine, Mining, Native Lands, Newspaper Registrations, Police, Pilots, Post Office, Prisons, Public Assemblies, Public Health, Public Hospitals, Shops, Sugar Industry, Telecommunications, Town Planning, Trade Disputes, Trade Unions etc.

(5) of section 15 seems to provide a defence to such a claim. That provision obviously has a very far-reaching effect. Not only the original law but also any subsequent re-enactment is covered. It seems that the protection granted by section 15 (1) will have very little practical effect.

It is sincerely to be hoped that the courts in Fiji, when the question is raised, will give subsection (5) a very strict and restrictive construction - a construction in accordance with the spirit of the fundamental rights provisions. It is submitted that this subsection must be interpreted to mean that the exemption applies only where there is an express provision or a clear implication in the legislation permitting potentially discriminatory actions. The courts should examine the whole spirit and policy of the law in question. The law must be such that it was virtually necessary for power to act in a discrminatory manner to be given. Thus if the provisions of the enactment do not spell out, either expressly or by very clear and necessary implication, the power and necessity to act in a discrminatory manner, the law in question and/or the actions of the person acting by virtue of such law ought not to be upheld.

Section 5 of the Banking Ordinance [21] provides an illuminating example. It authorises the Minister of Finance to grant licences for the purposes of carrying on the business of banking

---

21 Ch. 182 of the Laws of Fiji.

in Fiji.[22] The power so granted is very wide. No doubt, under

---

22 Section 5 provides: ....

4 (a) The Minister may and without assigning any reason therefor -

(i) refuse to grant a licence to any commercial bank other than a scheduled commercial bank; or

(ii) grant a licence to any commercial bank subject to such conditions as to him may seem desirable as to the commercial bank having at all times available for its use assets sufficient to meet its liabilities within Fiji.

(b) No decision made by the Minister under this sub-section shall be called in question in any court.

5 The Minister may and without assigning any reason therefore -

(a) refuse to grant a licence to any savings bank, other than a scheduled savings bank, or to a financial institution; or

(b) grant a licence to any savings bank or financial institution subject to such conditions as he may think fit and may vary or revoke any conditions attached to the grant of such licence or impose additional conditions; or

(c) revoke a licence granted to a savings bank or financial institution if in his opinion the conditions attached to such licence or any of such conditions have not been complied with or have been contravened.

Provided that before any licence is revoked under this sub-section the Minister shall give to the savings bank or financial institution notice in writing of his intention to do so, specifying a date upon which revocation will take effect (which date shall not be less than fourteen days from the date of the notice) and calling upon the savings bank or financial institution to show cause to him why such licence should not be revoked.

such wide powers, the Minister concerned could act in a discriminatory manner by refusing a licence to a citizen of Fiji of (say) Chinese race. He would be acting under the authority of the law because this Ordinance was in force on September 1966.[23] Very strictly, one may say that the Minister acted, albeit in a discriminatory manner, under the provisions of the law which was in force on the relevant date. Hence his actions would be exempted.

---

22 continued.

No decision made by the Minister under the provisions of paragraph (a) or paragraph (b) of this subsection shall be called in question by any Court.

6. The Minister may, upon receiving a report from an examiner appointed under the provisions of section 15 of this Ordinance, at any time revoke a licence -

(a) if he considers that a company licensed under this Ordinance is not carrying on its business in a sound financial manner or is contravening the provisions of this Ordinance.

(b) if the holder ceases to carry on banking business in Fiji or goes into liquidation or is wound up or otherwise dissolved:

Provided that before any licence is revoked the Minister shall give to the company notice in writing of his intention to do so specifying a date upon which revocation will take effect (which date shall be not less than fourteen days from the date of the notice) and calling upon the company to show cause to him why such licence should not be revoked.

23 Although amended in 1971 and 1972 but the provisions covered in the example were not affected.

However, it is submitted, such an interpretation would not be in keeping with the spirit of the fundamental rights provisions of the Constitution. The Banking Ordinance does not spell out expressly or by clear implication the power and necessity to act in a discriminatory manner. It is submitted that the purpose of such power is to regulate banking business in Fiji and such a power does not authorise discriminatory actions.

(c) Derogation from Fundamental Rights Provisions During Emergencies

Besides the usual restrictions on fundamental human rights and freedoms for specified reasons, e.g. public safety, public order and public morality, certain rights and freedoms can be derogated from during a period of public emergency[24] which is defined as the period during which -[25]

(a) Fiji is engaged in any war; or

(b) There is in force a proclamation by the Governor-General declaring that a state of public emergency exists.

Such a proclamation, unless revoked earlier, will be valid for only six months from the date when it was made unless in the meantime it has been approved by a resolution of each House of Parliament. Once so approved, the proclamation remains in

---

24 Constitution, ss. 5 (7), 8 (2) and 16.

25 Ibid., s. 18 (6).

force as long as those resolutions remain in force.[26] Resolutions remain in force for only six months but they may be extended from time to time for periods not exceeding six months.[27]

It is submitted that as regards the derogation of fundamental rights provisions touching the personal liberty of the subject, the measure must be one which is reasonably justifiable for the purpose of dealing with the situation existing in Fiji during the period of emergency.[28] For the purpose of defining what constitutes a "period of public emergency" the proclamation by the Governor-General is all important. There is no definition of "emergency" nor is any basis provided for deciding whether or not an emergency has arisen. Accordingly, it appears that the courts will not have judicial power to review the proclamation of the Governor-General to decide whether in fact a situation of "emergency" had arisen. The Governor-General is not required to give reasons for declaring that a state of emergency exists. All that is required is for the Governor-General to declare that a state of emergency exists and such a proclamation would be quite constitutional. This is an example of power being conferred in subjective terms. In Nigeria, a similar power to declare a state of emergency by a resolution of each House was vested in Parliament under the 1960 Constitution. It was held that whether a state of emergency existed or not was a matter for Parliament, and not for the courts to decide.[29] It is submitted that such provisions as section 18(5),

---

26 Ibid., s. 18(7).

27 Ibid., s. 18(8).

28 Williams v Majekodunmi [1962] 1 ALL N.R. 413.

29 Williams v Majekodunmi [1962] 1 ALL N.R. 413. The court did state however, that it had jurisdiction to determine whether or not certain acts are reasonably justifiable during an emergency. As to this, see p. 478, post.

18 (6) and 18 (7) are too wide and make it easy for the executive and the government to declare a state of emergency and to continue the declaration in force with the support of a bare majority in Parliament. It provides an opportunity for the authorities to use the power for political purposes rather than the preservation of law and order.[30] It is also clear that the authorities can maintain a state of emergency over any part of Fiji, no matter how peaceful that area may be. The courts will have no control over the exercise of the power. This again is most unfortunate inasmuch as during periods of emergencies far-reaching powers are taken by the government. It is possible for the liberty and freedom of the individual and the fundamental rights provisions generally to be greatly undermined. Professor D. O. Aihe has aptly observed in relation to Zambia:[31]

> This lack of judicial review is a threat to the guaranteed rights since certain human rights ... are completely taken away and others restricted during emergency. The nakedness of this threat is apparent from the fact that the constitution, did not define 'emergency', thus it is conceivable that the declaration of emergency might be made even when, prima facie, emergency conditions to not appear to exist.[32]

However, judicial review is not completely excluded. The

---

30 The invoking of similar powers in India in June 1975 provides an illuminating example.

31 Aihe, loc. cit., 624.

32 Cf. the situation in India since June 1975. It seems that the emergency powers were invoked in the personal interests of Prime Minister Indira Gandhi rather than to combat emergency conditions.

measures taken must be such as are reasonably justifiable for the purpose of dealing with the situation existing in Fiji. Under section 17, if any person alleges that any of the provisions relating to fundamental rights have been contravened in relation to him, he may apply to the courts for relief. Thus, it is the courts which will ultimately decide whether or not deprivation of personal liberty is reasonably justifiable in a period of emergency. It was so held in Nigeria that the court had jurisdiction to determine whether or not certain acts were reasonably justifiable during an emergency, although it had no jurisdiction to inquire whether the state of emergency should have been declared. Williams v Majekodunmi[33] illustrates this. As a result of a crisis in the Western Region of Nigeria, the Federal Parliament had declared a state of emergency. The crisis was brought about by a rift in the Action Group which was the ruling party in the House of Assembly of the Western Region. As a result the Premier, Chief Akintola, no longer commanded the majority support of the party. The Governor of the Region refused a request by the Premier to dissolve Parliament and the speaker also rejected a request by the Premier to assemble Parliament. In the meantime, the Governor appointed Chief Adegbenro as the Premier. When the assembly met, there was an uproar and riot, as a result of which a declaration of emergency was pronounced by the Federal Parliament. The plaintiff, Williams, was the legal adviser and a member of the national executive of the ruling party when the rift occured. The Administrator, appointed for the Region during this period of emergency, served restriction orders on a number

---

33 [1962] 1 ALL N.R. 413.

of people, including the plaintiff. His freedom of movement was restricted to a distance of three miles. Chief Williams admitted to being a member of the national executive of the Action Group and the legal adviser to the party, but he had, prior to the crisis within the party, attempted to restore peace between the two warring factions and he had not been present at the meeting of the national executive which deposed Chief Akintola from his position as leader. It was held by the Federal Supreme Court of Nigeria that on these facts, even though the disturbances were regarded as rendering restriction orders reasonably justifiable, the plaintiff had established that such a restriction was not reasonably justifiable in his case and the evidence of the defendant had failed to rebut this. Bairamian F.J., giving the judgement of the court, put it thus:[34]

> Apparently the learned Attorney-General left it to be inferred that the mere fact of being legal adviser made it reasonably justifiable to restrict the plaintiff's freedom of movement. Merely from that fact, such an inference could not legitimately be drawn.

The court set aside the restriction order while recognising that the fact that Parliament had declared an emergency was a factor to take into consideration when deciding whether or not the measures were reasonably justifiable in any given circumstances.[35]

It is submitted that the courts in Fiji should examine the application of a measure taken during a period of emergency in

---

34 Ibid., 421.

35 Ibid., 422.

relation to the particular person who invokes the powers of the court by seeking redress under section 17 against infringement of a fundamental rights provision. A measure may be reasonably justifiable against certain persons or class of persons, but fail to be reasonably justifiable against others. Hence every individual case must be decided on its own merits and circumstances.[36] This would reduce the possibility of decisions being mala fide or being politically motivated when orders are made restricting or curtailing fundamental rights, liberties and freedoms. If the application of general measures to individual cases is examined by the courts, they will be able, to a limited extent of course, to embark upon an enquiry as to the need or necessity for the proclamation of the emergency and thereby require it to be justified objectively. This, it is submitted, would be in keeping with the real spirit of the fundamental rights provisions and would inhibit the executive and the government from acting in an absolutely arbitrary manner. In other words, the courts, while bound to accept the validity of the proclamation of the Governor-General that an emergency exists, will inquire into measures taken to ensure that the interference with fundamental rights is reasonably justifiable under the circumstances of each case.[37] As Chief Justice Ademola said:[38]

> If [human rights] are to be invaded at all, it must be only to the extent that is essential for the sake of some recognised

---

36 See Williams v Majekodunmi [1962] 1 ALL N.R. 413.

37 If such a provision had been included in the Indian Constitution, perhaps Indira Gandhi would have been spared much of the criticisms levelled against her and the Congress Party.

38 [1962] 1 ALL N.R. 413, 426.

public interest and may not be farther.

It is submitted that, if the courts do not take this approach, their inability to review the validity of the proclamation will be a very serious threat to the constitutional guarantees of fundamental rights. The executive and the government, under the guise of "emergency" or "public defence" or "public safety", would otherwise be able to act in an arbitrary manner.[39] Arbitrariness and its avoidance is the central theme running through the constitutional guarantees in Fiji. The basic intent of the fundamental rights provisions is the protection of the subject from arbitrary actions by the authorities - executive and legislature alike.

The courts must establish themselves as the guardians of the liberty of man, even in times of emergency. Any provision which purports to derogate from the fundamental rights provisions should be construed strictly. Thus in Nigeria in Agbaje v Commissioner of Police of Western State,[40] it was firmly established that the right to personal liberty guaranteed under the 1963 constitution would be strictly upheld, even in times of emergency. It was further held that whoever alleges that a citizen has been lawfully deprived of his liberty must prove his allegation strictly. Aguda J., delivering the judgement of the High Court of Western State said in relation to the powers granted to the Inspector-General of Police under a Decree:[41]

---

39 The arbitrary exercise of emergency powers in India in June 1975 could equally be repeated in Fiji.

40 (1969) 1 Nigerian Monthly Law Rep. 137.

41 Ibid., 139. The relevant part of the provision of the decree is quoted:

> If the Inspector-General of Police ... is satisfied that any person is or recently has been concerned in acts prejudicial to public order, or in the preparation or instigation of such acts, and that by reason thereof it is necessary to exercise control over him, he may by order in writing direct that person be detained....

> As it should be noted these are wide and arbitrary powers in derogation of the entrenched clauses of the Constitution relating to fundamental rights as contained in Chapter III of the Constitution. It is clear and I have not the slightest doubt in my mind that in that circumstance, there is cast upon the Inspector-General of Police the onus to establish before any court in which the exercise by him of powers conferred on him by the above provision has been challenged, that he has complied strictly with the enactment under which he has acted. Not only that, but it must also be shown that every other person acting under his control or in purported execution of his orders complied strictly with the provisions of the Act ....
>
> I bear it in mind that where the liberty of the citizen comes into conflict with the safety and the corporate existence of the state, the liberty of the person has to give way to the latter, salus populi suprema lex, especially during times of war or national emergency .... However, it is clear that in the process the Courts have a vital role to play - in fact it is partly for the resolution of such conflicts that the courts of the land have been established.

When a person is detained under emergency laws he is entitled, within seven days of the commencement of his detention, to know in writing, in a language that he understands, the grounds of his detention.[42] Within a month of his detention, and thereafter during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal. On any such review, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which the detention was ordered. Unless the law provides otherwise, the authority concerned will not be bound by any such recommendation.

It seems that protection is given with one hand but diluted by the other. It may be said that the authority concerned would

---

42 Constitution, s. 16.

give great weight to the recommendation of the tribunal. However, since the authority concerned will not be constitutionally bound by the recommendations of the tribunal, arbitrary power is uncontrolled; this gives cause for alarm. It is submitted that there ought to have been a proper balance drawn between the interests of the individual and the needs of the state. The authority concerned ought not to be allowed to reject, in its absolute discretion, the recommendation of the tribunal under all circumstances. After all, appointments to the tribunal, being in the hands of the Chief Justice, should be non-political and enjoy the confidence of the people. It is suggested that the provisions would be improved by requiring termination of detention if the tribunal has made three successive recommendations to that effect. This must be without prejudice to an earlier termination if the authority concerned deems it fit. Representations would be made to the tribunal on behalf of the authority concerned and the detainee. As it is only after consideration of all the factors relating to the necessity and expediency of continuing the detention that the tribunal would make its recommendations, it would be better for the impartial tribunal to be invested with powers to make binding recommendations. This would strike a better balance between the interests of the state and the rights of an individual.

Furthermore, it must also be provided that a person released from detention should not be detained upon the same grounds without leave of the tribunal recommending his release. Otherwise, a man released to day might be re-arrested and detained tomorrow.

(d) Social Behaviour

(i) General

The future of a country depends upon the relationship of the people and their outlook. This is particularly so in a multi-racial

society like Fiji. When one speaks of the government of a country, the question arises as to who is "the government"? The broad answer is the people because the government represents the will of the majority of the people. Hence the government will to a great extent mould its actions and policies to satisfy the general wish. The general relationship of the people inter se will be of paramount importance for the stability and security of the government and the country as a whole.

The fundamental rights provisions of the Fiji Constitution are intended to place restraint only on the actions of the executive and the legislature. Occasions involving fundamental rights will arise in many areas of social behaviour that are outside the sphere of the constitutional provisions. In important fields such as discrimination, group or individual invasion of human rights are not covered by the Constitution, except to a limited extent as regards shops, hotels and other defined places of public resort.[43] Otherwise an individual's right to restrict the use of his property, however unregenerate a particular exercise of that right may be thought, lies beyond the reach of the fundamental rights provisions of the Constitution.

In view of the fact that Fiji is a society with significant racial elements there is a strong need to treat this question of social behaviour pertaining to discriminatory actions in greater detail. Racial harmoney will play a vital part in the future of the country.

Importance attaches to the interpretations placed on sections 3 and 15 of the Constitution.[44] These two sections

---

43 Ibid., s. 15 (6).

44 S. 3 provides:

(cont)

disclose a unity of purpose comparable to the "equal protection of the laws" phrase of the Fourteenth Amendment of the United States Constitution, a blanket provision securing the "protection

---

44 continued.

> Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely -
>
> (a) life, liberty, security of person and the protection of the law;
>
> (b) freedom of conscience, of expression and of assembly and association; and
>
> (c) protection of the privacy of his home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

Section. 15 (1) provides:

> Subject to the provision of this section -
>
> (a) no law shall make any provision that is discriminatory either of itself or in its effect; and
>
> (b) no person shall be treated in a discrminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

of the law" without regard to "race, place of origin, political opinion, colour, creed or sex". The enjoyment of all the fundamental rights by every person is subject to the overriding factor of "the public interest".

Section 15 is a stricture not only on the legislature but also on the actions of "any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority". It is unfortunate that the Constitution does not strike at discrimination in any form as it has done in the limited cases of shops, restaurants, and other "public" places. This would have made the position clearer and thereby obviated uncertainties and the need for judicial interpretations. The precise effect of sections 3 and 15 will depend upon the view taken by the Fiji courts. It is sincerely hoped that they will interpret the provisions liberally and thereby give full effect to the concept of non-discrimination embodied in sections 3 and 15.

It is submitted that this concept was intended to shield every person living in Fiji in the most ample way from discrimination resulting from the actions of government, its officials or individuals. To give maximum effect to the concept, the courts not only ought to scrutine government action but also to treat private conduct abridging individual rights as a violation of the Constitution when the state in any of its manifestations becomes involved. Certain private actions should also be subject to the restraints imposed by sections 3 and 15 of the Constitution if they constitute the exercise of a "public" function.

(ii) Public Function and State Involvement

In the United States of America, the social behaviour of individuals is controlled to a significant extent by the provisions of the "equal protection of the laws" secured by the Fourteenth Amendment of the Constitution which states that:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The Supreme Court has been able to strike down as discriminatory action taken by private individuals. What was apparently private conduct was treated as state action and thereby subjected to the Fourteenth Amendment restrictions. However, the extent to which other seemingly private activities could be included in this concept of State action was often obscure. One of the earliest but potentially very far-reaching theme in the expansion of the state action concept, was the view that "private" action was subject to the Fourteenth Amendment if it constituted the exercise of a "public function". Also, it came to be recognised that private action or conduct abridging individual rights did no violation to the equal protection clause of the Fourteenth Amendment unless to some significant extent the state in any of its manifestations had become involved in it.[45] Thus the decisions of the courts in the United States before 1964[46] may be examined with advantage.

---

45 Peterson v Greensville 373 U.S. 244 (1963).

46 From 1964 the civil liberties were covered by legislation which declared discrimination unlawful in all walks of life affecting the public.

In Marsh v Alabama,[47] the majority opinion delivered by Black J. extended the "public function" aspect of the state action concept. In this case the Supreme Court reversed a state trespass conviction of a Jehovah's Witness who had distributed religious literature in a company-owned town contrary to the wishes of the town's management. Black J. rejected the contention that the corporate owner's control of the town was "co-extensive with the right of a homeowner to regulate the conduct of his guests." The learned judge stated:[48]

> Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it .... Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation.

The learned judge added:[49]

> The 'business block' serves as the community shopping center and is freely accessible and open to the people in the area and those passing through. The managers ... cannot curtail the liberty of press and religion of these people consistently with the purposes of the Constitutional guarantees, and a state statute, as the one here involved, which enforces such action by criminally punishing those who attempt to distribute religious literature clearly violates the First and Fourteenth Amendments to the Constitution.

---

47 326 U.S. 501 (1945). See also Amalgamated Food Employees Union v Logan Valley Plaza 391 U.S. 308 (1968).

48 326 U.S. 501, 506 (1945) (emphasis added).

49 Ibid., 508.

In Evans v Newton[50] the question arose concerning the use of a park created pursuant to a trust established in a will. The trust provided that the park be used by white people only. The city originally acted as trustee. After the city had stated that it could no longer constitutionally enforce the racial restriction, the state courts accepted the city's resignation as trustee and appointed private trustees. The Supreme Court held that the park could nevertheless not be operated on a racially restrictive basis.[51] The majority relied on the "public function" ground as additional[52] support for its conclusion. Douglas J. said:[53]

> This conclusion is buttressed by the nature of the service rendered the community by a park. The service rendered even by a private park of this character is municipal in nature.... Mass recreation through the use of parks is plaintly in the public domain...; and state courts that aid

---

50 382 U.S. 296 (1966).

51 Cf. Evans v Abney 396 U.S. 435 (1970. See also Pennsylvania v Board of Trusts 353 U.S. 230 (1957); Re Girard College Trusteeship 357 U.S. 570 (1958); Brown v Pennsylvania; 391 U.S. 921 (1968); E. Clark, "Charitable Trusts, The Fourteenth Amendment and the will of Stephen Girard," (1957) 66 Yale L. J. 979.

52 The first ground was that the record showed that there had been no change in municipal maintenance and concern over the park. The court said at p. 301 that:

> where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

53 382 U.S. 296, 301 (1966). See also Terry v Adams 345 U.S. 461 (1952), and Public Utilities Commission v Pollak 343 U.S. 451 (1951).

> private parties to perform that public function on a segregated basis implicate the State in conduct proscribed by the Fourteenth Amendment.

In Shelly v Kraemer,[54] the relief sought was the enforcement, by means of injunction, of agreements among property owners imposing restrictions against occupancy of certain lands by any persons not of Caucasian race. The only issue before the court was the constitutional one. It was held that enforcement by state courts of the restrictive agreements denied the equal protection of the laws within the Fourteenth Amendment. The discriminatory covenant was not, if taken by itself, in violation of the Constitution: it was the intervention by the state that offended the Amendment. The emphasis was on enforcement.[55]

> [T]he principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no sheild against merely private conduct, however discriminatory or wrongful.

So long as the purposes of the agreements were effectuated by voluntary adherence to their terms, there was no action by the state and the provisions of the Amendment had not been violated. However, it was finally held that:[56]

> The enforcement of the restrictive agreements by the state courts .... bears the clear and unmistakable imprimatur of the state.

---

54 334 U.S. 1 (1948).

55 Ibid., 13.

56 Ibid., 19.

The Supreme Court has extended the principle applicable to an enforcement of a restrictive covenant by a damages suit against a co-covenantor.[57]

As a sequel to Evans v Newton[58] the state court ruled that the testator's intention to provide a park for the white community only had become impossible to fulfil. Accordingly the trust had failed and the parkland reverted by operation of Georgia law to the heirs of the testator. The Supreme Court held that this ruling did not constitute state discrimination under the Fourteenth Amendment.[59] It is submitted that this case shows that the Shelley case had not barred all state involvement in enforcing private restrictions on property.

The Shelley case has however, been extended to other fields. It has been used to bar the enforcement of state trespass laws against persons excluded from private property on racial grounds. Thus in Peterson v Greenville[60] the demonstrators engaged in a "sit-in" in a restaurant refused to leave when requested by the manager. There was a state law which prohibited integration at a restaurant. The manager admitted that he had refused to serve the Negros because of this law and his personal convictions. The Supreme Court refused to inquire whether he would have excluded the demonstrators if the State had been

---

57 Barrows v Jackson, 364 U.S. 249 (1953).

58 382 U.S. 296 (1966).

59 Evans v Abney 396 U.S. 435 (1970).

60 373 U.S. 244 (1963). See also Bell v Maryland, 378 U.S. 226 (1964).

wholly silent. The majority held that the conviction of the demonstrators for breach of the state trespass laws could not be sustained even assuming the restaurant manager acted in accordance with his personal conviction. Chief Justice Warren said:[61]

> [T]he convictions had the effect, which the State cannot deny, of enforcing the ordinance passed by the City of Greenville, the agency of the State. When a state agency passes a law compelling persons to discriminate against other persons because of race, and the State's criminal processes are employed in a way which enforces the discrimination mandated by that law, such a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators.

The principle of "state" action has also been extended to the lessee from a municipal authority carrying on business as a restaurant owner in a building forming part of a parking building.[62]

These illustrations from the United States point out the ways in which a private action may be subjected to constitutional limitations pertaining to discrimination. What is the position in Fiji?

---

61 373 U.S. 244, 248 (1963).

62 Burton v Wilmington Parking Authority 365 U.S. 715 (1961). However, see the qualification placed at p. 725 where the court said

> [T]he conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested.

As submitted earlier, the courts in Fiji may declare even private conduct abridging individual rights to be in violation of the Constitution if the state in any of its manifestations becomes involved to a substantial extent. An obvious example would be the invoking of the judicial process to enforce a discriminatory element in an agreement. In such a case the court, as an agency of the state would become involved and the constitutional provisions would come into play.

As submitted earlier, "private" actions may be subject to the Constitution where they constitute the exercise of a "public" function. In these cases the Fiji courts ought to assume jurisdiction to declare such actions unconstitutional. This was one of the earliest and potentially very far-reaching basis for expanding the state action concept in the United States.[63] Its usefulness in Fiji will be illustrated by reference to public transport.

Public transport is a public service. The entire transport industry in Fiji is regulated by the government and the necessary facilities such as roads and bridges are controlled and manned by the state. The system is supervised by various Boards;[64] but no matter who is the agent or what is the agency, the function performed is that of the state. Although the owners running the services are all private companies or individuals, they operate by leave of the state. Thus, it is submitted, a company offering

---

63 Pp.487 et seq., ante.

64 E.g., the Transport Control Board established under the Traffic Ordinance (Ch. 152 of the Laws of Fiji) is responsible for all public transport on land.

public transport is a governmental agency in terms of its "function"; it was created primarily to discharge a "public function" and must expect to be controlled for the public benefit. Such companies or private individuals cannot be heard to maintain that, should they act in a discriminatory manner, their actions are of a "private" nature. Their actions must be subjected to the provisions of section 3 and 15 in particular and other provisions generally.[65] It was in this context that the Supreme Court of the United States held[66] that a common carrier exercises "a sort of public office, and has public duties to perform, from which he should not be permitted to exonerate himself without the assent of the parties concerned." A private company or individual operating public transport is engaged in quasi-public employment. The law gives him certain privileges[67] and he is charged with certain duties[68] and responsibilities to the public.

It is contended that these considerations apply in other fields. Actions of all private concerns exercising public or quasi-public functions will be subject to sections 3 and 15 of the Constitution. But if the actions of a private individual or concern are not of a public or quasi-public nature, the Constitution cannot

---

65 Cf. Marsh v Alabama 326 U.S. 501 (1945).

66 New Jersey Steam Navigation Co. v Merchants' Bank of Boston 47 U.S. 344 (1848). See also Olcott v Supervisors 83 U.S. 382 (1872).

67 Traffic Ordinance ss. 63 - 66.

68 Ibid., s. 67.

extend to their actions.

In any event at common law a discriminatory clause in an agreement will not be enforced by the courts of law if it is contrary to public policy. Thus in Re Drummond Wren[69] a restrictive covenant in a transfer of land prohibiting alienation to "jews or persons of objectionable nationality" was held void as being contrary to public policy. In a significant passage Mackay J. said:[70]

> Ontario, and Canada too, may well be termed a Province, and a country, of minorities in regard to the religious and ethnic groups which live therein. It appears to me to be a moral duty, at least, to lend aid to all forces of cohesion, and similarly to repel all fissiparous tendencies which would imperil national unity The common law Courts have, by their actions over the years, obviated the need for rigid constitutional guarantees in our polity by their wise use of the doctrine of public policy as an active agent in the promotion of the public weal.

Similarly Lord Justice Denning (as he then was) said:[71]

> [I]t is clear beyond peradventure that the common law of England has always regarded a man's race or colour as just as irrelevant in ascertaining his rights and duties as the colour of his hair

---

69 [1945] 4 D. L. R. 674. See also Noble and Wolfe v Alley [1951] 1 D. L. R. 321 and D. A. L. Smout, "An Inquiry into the Law on Racial and Religious Restraints on Alienation", (1952), 30 Can. Bar Rev. 863.

70 [1945] 4 D. L. R. 674, 679.

71 Freedom and the Law (1949), Chap 2.

Section 3 of the Constitution expressly provides that the enjoyment of the rights of an individual shall be subject to the overriding factor of "public interest". It is submitted that when something is contrary to public policy, it necessarily affects "public interest". The concept of public policy could be incorporated in the term "public interest". As was said by Tindal C. J.[72]

> Whatever is injurious to the interests of the public is void, on the ground of public policy.

For a government agency and especially a court to give effect to a discriminatory practice would be injurious to the public good and hence contrary to the "public interest". The consequences, particularly of judicial approbation of discrimination, are portentous.

Thus, a discriminatory element, for instance a restrictive term in an agreement, standing by itself, cannot be regarded as violative of any right guaranteed by the Constitution. So long as the agreements are honoured or followed by voluntary adherence to their terms no complaint can be made; but as soon as the assistance of the court, or of any other governmental organ is sought for its enforcement, it involves the state and hence sections 3 and 15 of the Constitution come into play.

State involvement could come in a less direct way. For instance, public assistance to discriminatory organisations will be a form of state complicity that might result in the Constitution being invoked. This may be well illustrated by a recent decision

---

72 Horner v Graves (1831) 7 Bing 735, 743.

of the United States Supreme Court. In Norwood v Harrison,[73] a unanimous court struck down a state text book loan programme applied to all schools regardless of their racially discriminatory policies. The court found the constitutional infirmity of the programme to be that it significantly aided the organization and continuation of a private system that was free to discriminate if it so desired.[74] However, the court conceded that assistance in the form of "generalised services provided to schools in common with others" that cannot readily be obtained "on the open market", e.g. police and fire protection, may be permissible.[75] The court maintained that any aid to discriminatory private schools going beyond that level is a violation of equal protection guarantees.

It has been argued, regarding less direct means of state involvement, that mere enjoyment by a corporation of a state charter is sufficient to incur constitutional limitations on the corporation's activities.[76] However, it has been held that discrimination by an otherwise private entity is not violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution merely because the private entity

---

73 413 U.S 455 (1973).

74 Ibid., 467.

75 Ibid., 465.

76 A.A. Berle, "Constitutional Limitations on Corporate Activity - Protection of Personal Rights from Invasion Through Economic Power," (1952) 100 U. Pa. L. Rev. 933, 951-952.

receives some sort of benefit or service from the state or because it is subject in some degree to state regulation.[77] Where the impetus for discrimination is private, the state must significantly involve itself with the invidious discrimination in order for the discriminatory action to fall within the ambit of the constitutional prohibition.[78] However detailed in some particulars the regulations may be, such regulation cannot be said in any way to foster or encourage racial discrimination.[79] Thus in Moose Lodge No 107 v Irvis[80] a Negro guest of a member of an all-white Moose Lodge had been refused service in the club's dining room. As a result, he sought to have the club's state liquor licence revoked on equal protection grounds. The majority of the Supreme Court refused to find the requisite "state action" in the extensive state regulations governing the sale and distribution of liquor sold by the club. In the majority's view, state regulation could rise to the level of "state action" only if it played a part in establishing or enforcing the club's discriminatory policies.[81] However, the court did suggest that if the state regulation can be deemed to "foster or encourage racial discrimination"[82] the result would be different. It must in some way be implicated in the policies of the entity to render the action "state action".

---

77 Moose Lodge No. 107 v Irvis 407 U.S. 163 (1972)

78 Ibid.

79 Ibid.

80 Supra.

81 Ibid., 175 - 177.

82 Ibid., 177.

Accordingly, it is submitted, where legislation requires the registration of a certain body and the Registrar has a discretion to refuse an application for good reason, the state does become involved if the registration of such a body is accepted with knowledge of the discriminatory purposes or objectives of the body concerned. In such a case the state would be "fostering" and "encouraging" racial discrimination. An illustration in Fiji would be the registration of a trade union which discriminates between applicants for membership on any of the grounds prohibited by section 15 of the Constitution.

CHAPTER XII

ENFORCEMENT AND INSTITUTIONAL SAFEGUARDS OF FUNDAMENTAL RIGHTS

In any Constitution a Bill of Rights, no matter how comprehensive, will not by itself provide a complete safeguard for the interests of the people it is designed to protect. The process of enforcement and institutional safeguards are as important as the presence of fundamental rights provisions themselves. It is one thing to devise something in theory and quite another to implement it.

Under the Fiji Constitution, anyone whose guaranteed right has been, is being, or is likely to be contravened "in relation to him" can apply to the Supreme Court for redress; and the Supreme Court is empowered to make such orders, issue such writs and give such directions as it may consider appropriate for enforcing the right.[1] In Nigeria it has been held that the High Court even has jurisdiction, in appropriate cases, to make a declaratory judgement.[2]

However, the experience of other countries such as United States, India and Nigeria, has shown that there are limitations and technicalities in the enforcement of fundamental rights provisions by means of judicial review.[3] The constitutionality of

---

1 S. 17.

2 Olawoyin v Attorney-General [1961] 1 ALL N.L.R. 269. The fundamental rights provisions in Nigeria in 1961 were fundamentally the same as the present provisions of the Fiji Constitution.

3 For a more detailed treatment of the position in the United States see Gunther and Dowling, Cases and Materials on Individual Rights in Constitutional Law, (1970), 67 - 198; for the position in India see D.D. Basu, Commentary on the Constitution of India (5th ed. 1965), vol. 1, 170-203.

a statute cannot be determined by the court until some individual whose right is affected by it comes to the court to have his rights adjudicated upon. The court cannot act on its own initiative. A statute may be obviously and patently unconstitutional, but if the matter is not brought before the court in the prescribed manner, it will remain on the statute books. Sometimes there is a considerable time lag between the enactment or operation of the statute and the declaration of its invalidity by the courts.[4]

There are other technical and self-imposed limitations. The competence of the complainant to bring the dispute before the court may be open to challenge.[5] The fundamental rule is that the complainant must prove that a fundamental rights provision has been, is being or is likely to be contravened "in relation to him", an exception is made of course, in the case of a detained person.[6] A dispute also has to be presented in a justiciable form.[7] The court may refuse jurisdiction under the political question doctrine[8] if the question is such that the courts ought not to intervene but to leave the redress to the legis-

---

4 E.g., Myers v United States 272 U.S. 52 (1926), where the statute was declared invalid 50 years after its enactment.

5 Olawoyin v Attorney-General [1961] 1 ALL N.L.R. 269.

6 Constitution, s. 17 and see Gunther and Dowling, op. cit., 68 - 108 and Basu, op. cit., vol. 1, 170-203.

7 Massachusetts v Mellon 262 U.S. 447 (1932).

8 Gunther and Dowling, op. cit., 67 et seq., and Basu op. cit., vol. 1, 170 et seq.

lature.[9] Also, the question of constitutionality will be determined only in the last resort, and the court will not pass upon a constitutional question further than is necessary for the disposal of the particular case before it.[10] In Fiji, there does not seem to be provision for an advisory opinion being given by the courts.[11] Hence the judicial process can only be invoked if there is a breach, or likely breach, of a fundamental right provision of the Constitution. There is no provision whereby the court can advise the legislature as to the form of legislation or other action to be taken which will avoid the contravention of the human rights provisions.

There are provisions in the Fiji Constitution which, in practice, may not be very appropriately tackled in the courts of law. For instance, discrimination may not be harmful in certain circumstances, as for example, where it is used in the interests of certain weaker elements in society. Because Fiji is a heterogeneous society, discrimination may be present in many kinds of human activity. It may be desirable to assess and distinguish the beneficial and harmful discrimination outside a court by a truly independent body. Thus the Monckton Commission, which looked into the question of a Council of State in the Central African Federation stated:[12]

---

9 Colegrove v Green 328 U.S. 549 (1946).

10 Euclid v Ambler Realty Co. 272 U.S. 365 (1926).

11 Cf. the position in Canada when the Supreme Court may give a decision on a "reference" made to it.

12 Cmnd. 1148 (1960), para. 240.

> A Bill of Rights, however comprehensive, will not by itself provide a completely satisfactory safeguard for the inhabitants of the Federation. There remains the problem peculiar to a multiracial state, that of discrimination on grounds of race, colour or religion .... Discrimination open or disguised, is present in many kinds of human activity and may occur in a wide range of laws and executive actions. It is often harmful, but it may at times be beneficial where it is used to protect the interests of weaker classes or groups. To distinguish between beneficial and harmful discrimination is a difficult and delicate task which the courts cannot appropriately be asked to undertake. We believe that this is a political problem for which a different safeguard is needed.

Further, in practice, the enforcement of fundamental rights will be available only to individuals able to afford the costs of application to the Supreme Court. Redress for breach or threatened breach of fundamental rights can be given only by the Supreme Court.[13] Fiji is not an affluent society and many people may not be able to employ lawyers to present their grievances properly to the Supreme Court. Hence the usefulness of these provisions will be diminished.

For these reasons, alternatives must be found to ensure that everyone in Fiji has the greatest possible benefit and practical enjoyment of the comprehensive fundamental rights enshrined in the Constitution. There are three methods by which the operation of the provisions can be made effective. They will be discussed under these headings:

(a) The role of the judiciary

(b) Proposed Constitutional Council

(c) Proposed Statutory enforcement

---

13 Constitution, s. 17.

CHAPTER XIII

THE ROLE OF THE JUDICIARY

A. Introduction

It has been seen that to permit the legislature to make laws derogating from the declared rights and freedoms "in the interest of defence, public safety, public order" so long as the laws are "reasonably justifiable in a democratic society" is to allow a great deal of latitude. The major restraint on the legislature in this matter will be the courts.[1] The courts' conception of the minimum standards justifiable in this particular society and the extent to which they are prepared to defer to the legislature are of critical importance. The courts, it is submitted, have a great potential to develop the law in the field of fundamental human rights provisions under Chapter II of the Constitution. They will decide whether a derogation is justified.[2] Derogation will be permitted only if it is essential to secure some recognised public interest.[3] It has also been firmly established that the right to personal liberty must be strictly upheld even in times of national emergency.[4]

The fundamental rights provisions are entrenched and a special procedure for amendment is prescribed. The judiciary must ensure that the special procedure is complied with.[5] They

---

1 See pp.455 et seq., ante.

2 D.P.P. v Dr Chike Obi [1961] 1 ALL N.L.R. 180 and see generally pp.455 et seq., ante.

3 Williams v Majekodunmi [1962] 1 ALL N.L.R. 413 and see generally pp.455 et seq., ante.

4 Agbaje v Commission of Police (1969) 1 Nigerian Monthly Law Reports 137.

5 See pp.206 et seq., ante.

must also decide how far the Bill of Rights fetters legislative action and the extent to which those provisions in force when the Constitution came into operation affect the law.[6] The courts will be involved in interpreting the Constitution and determining the validity of statutes in the light of the Constitution. The task of the judiciary will not be an easy one particularly when it asserts its power of review over a strong legislature.[7]

These are matters related to the question of the extent to which the fundamental rights provisions fetter legislative freedom. But, it must not be overlooked that the fundamental rights provisions also place restrictions on the powers of the executive which has responsibility for implementing legislative policies. Here too the judiciary has an important creative role.

Rights and Remedies

In Fiji, there are two ways of enforcing the fundamental rights provisions. The first is by direct action under section 17 of the Constitution and the second is by invoking the provisions of the Constitution as a means of invalidating, indirectly, legislation or other executive action.

(a) Affirmative Action

Direct affirmative action may be taken under section 17 of the Constitution which empowers the Supreme Court of Fiji to

---

6 See pp.389 et seq., ante.

7 This matter is dealt with in great detail in Chap. IX, ante, entitled "Interpretation of the Constitution".

entertain applications for breaches or threatened breaches of the fundamental rights provisions.

In the United States it is rare for a constitutional right to be the basis of an affirmative cause of action. In the great majority of cases, the positive law of the Constitution had been created and applied in cases where constitutional guarantees were used as a shield to ward off actions taken by the government.[8] If successful, the result was to invalidate the legislation attacked. In this situation, the court "indirectly" enforced the constitutional guarantees, e.g. by not admitting the evidence illegally obtained.[9] In those cases in which an attempt was made to enforce the constitution "directly", the claimant invariably relied on legislative authority. However, in the celebrated Bivens v Six Unknown Named Agents of the Federal Bureau of Narcotics,[10] the Supreme Court ultimately held that, notwithstanding the absence of legislation creating a cause of action, violation of the Fourth Amendment's command against unreasonable searches and seizures by a federal agent acting under colour of federal authority, gave rise to a federal cause of action against the agent for damages consequent upon the agent's unconstitutional conduct. The Court held that, where federally protected rights have been invaded, the courts will be prepared to provide a remedy and grant the necessary relief. This decision was based on necessary implications of the Constitution.

---

8 See W.E. Dellinges, "Of Rights and Remedies: The Constitution as a Sword" (1972) 85 Harv. L. Rev. 1532.

9 Mapp v Ohio 367 U.S. 643 (1961).

10 403 U.S. 388 (1971).

In Fiji, there is an express provision in the Constitution granting an affirmative right of action in respect of breaches of the fundamental rights provisions.[11] But how wide is the Supreme Court's power to grant relief? Section 17 (1) enables an application be made to the Supreme Court for "redress" of breaches or likely breaches of fundamental rights provisions and section 17 (2) gives the Supreme Court the power to "make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions" relating to fundamental rights. It is submitted that this power is very wide. It includes authority to grant a declaratory judgement, injunction and any other remedy that might be available in an ordinary action.

But, does this include the award of monetary damages? It is submitted that the fundamental human rights provisions have been included in the Constitution to guarantee their protection. The framers of the Constitution have given such provisions a special position by entrenching them. The common law principle of ubi jus ibi remedium suggests that for the breach of rights specially protected a monetary award in the form of damages must be within the power of the Supreme Court. In fact, such an award would in many cases by the most appropriate remedy. The only effective remedy for a breach of section 12 (1), protecting an individual's correspondence from interference, is an award of damages. Once the "damage" has been done, an injunction would no longer be satisfactory as a primary remedy.

---

11 S. 17.

It is acceptable only as an ancilliary remedy. Remedial law must be adequate to protect personal interests defined in "political" documents like the Constitution. It is only then that the development of the norms of a legal system can become meaningful. The continuing validity and effectiveness of a Constitution demands a full range of remedies. It will be noticed that section 17 conferring the right to apply for redress speaks of a right that "has been, is being, or is likely to be contravened." Accordingly, the remedy is available not only when unconstitutional activity is threatened, but also when it has been accomplished. When a breach has occurred, redress by way of injunction may not fully compensate the injured person; only the award of damages will do this.

The action of trespass as it developed around the middle of the thirteenth century was initiated by the writ of trespass vi et armis contra pacem. The peace of the realm was seen to be threatened by personal injuries. The ordinary tort "action on the statute" - a cause of action in tort resulting from activity in violation of a legislatively created duty or standard - is, it is submitted, analogous to a tort action affecting the liberty of a person. The history of the action on the statute can be traced to the customary judicial use of money to settle disputes. Well before the development of trespass as a distinct form of action, money had been awarded in criminal appeals and the assize of novel disseisin.[12] The use of money as a means of settling disputes has been a feature of the English legal system from very

---

12 Al Katz, "The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v Hood" (1968) 117 U. Pa. L. Rev. 1, 18.

early days. As has been said:[13]

> A second reason for the flexibility of the forms of action in the early thirteenth century [the first being the effort by the king's court to draw judicial business away from the feudal courts] lies in the principle of damages, so important in English law, which had been introduced through the medium of the assize of novel disseisin and was gradually spreading to other forms of action. Until after 1250 these actions for damages took no fixed form, but were brought usually by a complaint in the form of a quare writ out of Chancery.

History reveals that the award of damages was the principal means of redressing wrongs.[14] However, as has been pointed out by Al Katz,[15] it must be remembered that, prior to the emergence of the common law, there existed two main types of procedure under what was then the Germanic customary law. One was a demand for specific relief, praecipe quod reddat, the other a complaint of wrong, quare, looking toward compensation by way of bot or similar settlement. It was around these practices that the development of the common law was built. One of the consequences was the emergence of the action on the statute.[16] As a general proposition, this rule may be stated as, "in the

---

13 E. J. Dix, "The Origins of the Action of Trespass on the Case," (1937) 46 Yale L. J. 1142.

14 Al Katz, loc cit., 19.

15 Idem.

16 As to a comprehensive history of the early developments of the law in this field see Al Katz, loc cit., and Dix, loc cit.; T. Plucknett, A Concise History of the Common Law (5th ed., 1956), 367.

absence of contrary legislative intent, an action will lie for breach of a statutory duty provided such remedy is consistent with the purpose of the legislation".[17] However, constitutional rights manifest the basic and fundamental proposition that an ordered society is impossible without a system of redress for wrongs between individuals. The concept of an ordered society runs through the fundamental rights and freedoms provisions. Thus Chief Justice Holt stated in his dissenting opinion in Ashby v White:[18]

> A right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur to the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of an high nature, and the law takes notice of it as such in divers statutes .... The right of voting at the election or burgesses is a thing of highest importance, and so great a privilege, that it is a great injury to deprive the plaintiff of it .... If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.... Where a new Act of Parliament is made for the benefit of the subject, if a man be hindered from the enjoyment of it, he shall have an action against such person who so obstructed him.

As the constitutional fundamental rights and freedoms are intended to afford protection to individuals, they should have the

---

17 Al Katz, loc. cit., 31.

18 (1702) 2 Ld. Raym. 938, 952. This dissenting opinion was accepted by the House of Lords.

same remedy as is available in an action on the statute in the law of torts. The Supreme Court in Fiji should interpret the Constitution in such a way as to ensure that there is an effective remedy for any breach or threatened breach of the fundamental human rights provisions. To achieve this, the breach of a fundamental right must be treated as giving the individual a cause of action similar to that in tort. The fundamental rights provisions will become a sword in the hands of the injured person. It would then be open to the courts to award damages, (special general, exemplary and/or punitive), injunctions etc. In so doing the courts will secure the maximum respect for fundamental rights and freedoms provisions by potential offenders.

(b) Negative Action

The value of the fundamental rights provisions do not depend solely on their being used as a "sword" but also when they are used as a "shield". They may be enforced not merely by direct action or application arising under section 17 of the Constitution but also in other proceedings. The constitutional rights of individuals may be breached directly or indirectly; any onslaught on these rights whether direct or indirect, must be scrutinized by the judiciary very carefully before any derogation is permitted. The courts must not tolerate any governmental action which will be an indirect infringement. This may be illustrated by an aspect of the administration of criminal justice in the United States. The constitutional rights of the accused have been a major source of judicial business for the United States Supreme Court which has adopted a creative role of extending the field of constitutional law into the administration of criminal justice. It

is not possible to give an exhaustive treatment in the present context[19] but the exclusionary rule of evidence will be mentioned as an illustration.

Section 9 (1) of the Constitution provides -

> Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

Then follow certain exceptions[20] which recognise that a law may provide for searches or entry in derogation of the above provision if the law is made in the interests of "defence, public safety, public order" etc. and such provisions are "reasonably justifiable in a democratic society".[21] Search of private premises may be made by virtue of search warrants,[23] and property seized by virtue of such search warrants may be detained.[24] There are also powers vested in police officers to

---

19 For a more detailed treatment of the protection available in the United States e.g. right to counsel, interrogation, confession and self-incrimination, the retroactive effect of new constitutional rulings, fair hearing and fair tribunal, double jeopardy, punishment and bail, etc., see Gunther and Dowling, op. cit., 258-340.

20 S. 9 (2).

21 As to a discussion of "reasonably justifiable in a democratic society", see pp. 455 et seq., ante.

22 Chap. 14 of the Laws of Fiji.

23 Criminal Procedure Code, ss. 104 - 108.

24 Ibid., s. 107.

search and detain persons and vehicles in certain circumstances.[25] These relate to matters pertaining to goods stolen or unlawfully obtained, or any article in respect of which a criminal offence or an offence against the customs law has been, is being, or is about to be committed.

In the United States, "unreasonable searches and seizures" are prohibited by the Constitution.[26] There, a search without a warrant is in general "unreasonable" unless very strong grounds justify it. What are the consequences of an "unlawful" search? In the United States unlawful searches by the police have been discouraged by excluding the evidence so procured from the trial, and reversing convictions where it has been admitted.[27] Thus in Mapp v Ohio[28] the accused was convicted by the Ohio court of knowingly having had in her possession and under her control certain lewd and lascivious books, pictures and photographs in violation of the statute. She was convicted primarily upon the evidence introduced as a result of an unlawful search of her home. The police officers' demand to enter her house without a search warrant was refused. A door was then forcibly opened and the policemen gained entrance. The defendant again demanded to see the search warrant. She was handcuffed and taken to her upstairs bedroom where the officers searched. A search of the entire house produced the obscene materials for possession of which she was ultimately convicted.

---

25 Ibid., s. 108.

26 Amendment IV.

27 See Weeks v United States 232 U.S. 383 (1914).

28 367 U.S. 643 (1961).

At the trial, no search warrant was produced nor was the failure to produce one explained. It was held by the Supreme Court that all evidence obtained by searches and seizures in violation of the Constitution is, by virtue of the Constitution guaranteeing the right to privacy free from unreasonable state intrusion, inadmissible. It was observed that, however much in a particular case insistence upon observance by law officers of traditional fair procedural requirements may appear as a technicality that inures to the benefit of a guilty person, the history of the criminal law proves that tolerance of short-cut methods in law enforcement impairs its enduring effectiveness.

The above cases may be compared with the Privy Council case of Kuruma v The Queen[29] where it was held that the test to be applied, both in civil and criminal cases, in considering whether evidence is admissible, is whether it is relevant to the matters in issue. If it is relevant, it is admissible and the court is not concerned with how it was obtained.

It is submitted that in Fiji, if the new legal order is to be given the maximum effect and operation, the Mapp principle must be preferred to Kuruma. The provisions and protection of section 9 of the Constitution are the result of the determination of the framers of the Fiji Constitution to secure to the people safeguards against unreasonable searches and seizures. Section 9 is a reaction against general warrants which resulted in invasions of the home and privacy of the citizen. This section

---

29 [1955] A.C. 197.

was considered by the Supreme Court of Fiji in Regina v Mohammed Hanif.[30] In this case Grant J. (as he then was) had to rule, inter alia, on the admissibility of a notebook and a savings account passbook seized from the accused by means of physical search while he was unlawfully detained at the police station. It was established that the accused did not consent to the search; neither was he arrested nor were there grounds for arresting him at the relevant time.

The learned judge referred to the exclusionary rule as it developed in the United States and made this pertinent observation:[31]

> However, it does not follow that because the Supreme Court of the United States of America found it necessary to judicially imply in the Constitution an exclusionary rule, which is in opposition to the ordinary assumptions of the Anglo-American law of evidence which generally postulates that competent evidence is not rendered automatically incompetent by virtue of the fact that it was obtained in an improper or illegal fashion, that the Supreme Court of Fiji should necessarily come to a similar conclusion.

Ultimately, the learned judge preferred the ordinary common law principles of excluding evidence to that of the stand taken by the Supreme Court of the United States. In so doing the learned judge took into account various factors, including the differences between the Constitution of the United States and that of Fiji. He said that one vital distinction was the fact that the Supreme Court of the United States had only appellate jurisdiction and not original jurisdiction as in the case of Fiji. Grant J. held:[32]

> In ... view of the power to enforce protective provisions and provide redress conferred on the Supreme Court by section 17 of the Fiji Constitution, I am not persuaded at this time that

30 (Unreported); Criminal Case No. 12 of 1972.

31 Ibid., 3.

32 Ibid. 4.

> the Supreme Court would be justified in implying an exclusionary rule and I think, on balance, that the common law principle should prevail.

It is submitted, with respect, that it is rather very unfortunate that the Supreme Court of Fiji took the above view. With the greatest of respect, it is submitted, that the distinction drawn between the jurisdiction of the Supreme Court of Fiji and that of the United States is irrelevant. The issue is the admissibility or otherwise of the illegally obtained evidence. In any event the Supreme Court of Fiji is also the appellate court of decisions from the Magistrates' Courts. Ommay respectfully ask: does it mean that the ruling of the Supreme Court in Fiji will depend on whether it is sitting as an appellate Court or as a court of first instance? Does it follow that if the Supreme Court in Mohammed Hanif had been sitting as an appellate court, this would have weighed with the Court as to whether or not to follow the American Supreme Court approach?

Further, it seems with respect, that the learned judge took the view that because section 17 of the Constitution gives a power to the Supreme Court to grant redress if there is a breach of the Constitution, the exclusionary rule should not be applied.

As mentioned earlier, section 9 of the Fiji Constitution is a reaction against general warrants which resulted in invasions of the home and privacy of the citizen. It was to prevent such arbitrary practices that section 9 has been enshrined in the Fiji Constitution recognising that a man's house is his castle, which is not to be invaded under any general authority to search and seize his personal chattels.[33]

Once such a protection is enshrined in the Constitution it is then clothed with the dignity of fundamental law which is not limited

---

33 Weeks v United States 232 U.S. 383, 390 (1914)

by the rules of the common law. The principles laid down by the Mapp case have a far reaching effect. As has been said by Mr Justice Bradley:[34]

> The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offence, but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence; it is the invasion of this sacred right, which underlies and constitutes the essence [of the breach] .

Accordingly, it is the duty of the courts to give full force and effect to the constitutional right. The courts have a special responsibility for the enforcement of the law and should fulfil it faithfully. It is submitted that any evidence, whether it is a confession or other material secured by unlawful seizures, should not be admitted by the courts, which are charged at all times with the preservation and enforcement of the Constitution. If "illegally" obtained evidence is admitted, the protection of the Constitution, which declares the right to be secure against such searches and seizures, will be of no practical value whatsoever.[35] The courts ought to declare themselves opposed to such "illegal" acts. Otherwise they would be "required to participate in, and in effect condone, the lawless activities of law enforcement officers".[36] Mr Justice Traynor aptly observed:[37]

> Out of regard for its own dignity as an agency of justice and

---

34 Boyd v United States 116 U.S. 616, 630 (1885).

35 Idem.

36 People v Cahan 282 P. 2d. 905, 912 (1955).

37 Idem.

custodian of liberty the court should not have a hand in such "dirty business".

It is true that section 17 of the Constitution does give a right to make application to the Supreme Court for relief in cases of breaches of the fundamental rights provisions. But, if "illegally" obtained evidence has already been admitted, the damage will already have been suffered and any later application to the Supreme Court under section 17 may become an academic exercise. The Supreme Court must be zealous to protect constitutional rights.

> [C]onstitutional provisions for the security of persons and property should be liberally construed .... It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon.[38]

If an act is unconstitutional, it affects the very root of the system. As Mr Justice Clark said:[39]

> Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.... The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognised that the right to privacy embodied in the [Constitution] is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the [Constitution], we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the court, that judicial integrity so necessary in the true administration of justice.

It is conceded that the constitutional provisions in Fiji do not themselves expressly answer the question whether evidence obtained

---

38 Boyd v United States 116 U S. 616, 635 (1885)

39 Mapp v Ohio 367 U.S. 643, 659-660 (1961).

in violation thereof is admissible in courts. Neither has Parliament provided an answer. But, it is submitted that if the courts are to give practical reality to the fundamental rights provisions and for the other reasons advanced, this evidence must be excluded. If this is not done, it is difficult to see what other remedies are available to secure compliance by public officers with the constitutional provisions. An exclusionary rule will at least act as a deterrent to the law enforcement officers and give the victim a practical and realistic protection.

If the constitutional guarantees are to have significance, they must be enforced, and, if the courts in Fiji are to discharge their duty of supporting the Constitution, they must be ready and willing to aid in their enforcement. The court must play its role effectively and maintain the Constitution with dignity. In this field for the development and protection of fundamental rights the primary responsibility rests with the judiciary.

CHAPTER XIV

PROPOSED CONSTITUTIONAL COUNCIL

A. Introduction

This scheme envisages the appointment of a special body to consider all bills and possibly other legislative measures before they are finally adopted. During the colonial era, the Governor was almost invariably instructed not to assent to a bill of a discriminatory character. He was required, expressly or implicitly, to reserve any such bill unless he had been authorised by the Secretary of State to assent to it, or the bill included a clause suspending its operation until Her Majesty's pleasure had been signified, or it was necessary to bring the bill into operation immediately.[1] In Fiji such a bill was identified as one[2] whereby persons not of European birth or descent may be subjected or made liable to any disabilities or restrictions to which persons of European birth or descent are not also subjected or made liable. In some countries non-discrimination was extended not only to racial communities but also to religious communities.[3]

In some colonial jurisdictions additional extra-judicial safeguards were provided. For example, in Basutoland, the High Commissioner's proclamations had to be referred to the Secretary of State at the request of the Basutoland National Council and Bills had to be reserved at the request of the Paramount Chief if

---

1 S.A. de Smith, "Fundamental Rights in the Commonwealth;" (1961) 10 I.C.L.Q. 83, 94. Much assistance has been derived from this article.

2 Royal Instructions dated 9 December 1929: Council Paper No. 67 of 1929, 11.

3 E.g., British Guiana (Royal Instructions, 1953, cl. 10 (h)); and also Fiji (Royal Instructions, 1963, cl. 6 (i)).

the ground of the objections was that they were discriminatory.[4]

In Kenya a Council of State was created.[5] The Council consisted of a chairman and ten members, appointed by the Governor of the Colony, holding office during Her Majesty's pleasure. The appointments were not to be made on any principle of sectional representation and members of the Legislative Council were debarred from concurrent membership of the Council of State.[6] The powers of the Council were merely advisory and supervisory. All it could do was examine proposed legislation to see if it was a "differentiating measure", which was defined by the Order in Council as[7]

> Any Bill or instrument any of the provisions of which are, or are likely in their practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other communities, either directly, by prejudicing persons of that community or indirectly, by giving an advantage to persons of another community.

The Council of State considered the matters in one of two ways.

---

4 Basutoland (Constitution) Order in Council (1959 S.I. 1959, Vol 2 appx), ss. 46 (2), 58 (2) (b) (iii).

5 The Constitution of the Council was set out in the Kenya (Constitution) Order in Council, 1958. For a detailed study of the Council of State in Kenya see Y.P. Ghai, "The Kenya Council of State" (1963), 12 I.C.L.Q. 1079.

6 S.I. 1958 No. 600, s. 48 (2).

7 Ibid., s. 54 (2).

A member of the public could write in and object to a measure and if he could convince a member, the latter could raise the matter in Council. Or Council members themselves could have the Council consider a Bill. The Council would consider the Bill before its third reading in the Legislative Council, and lay a statement before the Legislative Council declaring whether a measure was differentiating and whether it could be corrected by amendments suggested by the Council. The Legislative Council was obliged to consider the report of the Council of State and to notify its decision to the Council. After any Bill had been passed by the Legislative Council, and whether or not the Council of State had made a report on it, the Council could request its reservation for the signification of Her Majesty's pleasure on the ground that the legislation was differentiating. The Governor then had to reserve the Bill unless he was satisfied that it was urgently necessary in the public interest that the Bill be brought into immediate operation. In such a case the matter had to be reported to the Secretary of State.[8]

The Council of State also had the general function of giving assistance to the Governor or the Legislative Council (or a Minister), if so required, in the form of information or advice, particularly in relation to matters affecting persons of any racial or religious community in the country.[9]

---

8 Ibid., s. 57.

9 Ibid., s. 53. It had other functions which are not relevant for present purposes; see Ghai, loc. cit., 1096. However, the Kenya Council of State was put out of existence by the 1963 Constitution.

Another institutional safeguard against discriminatory legislation was the African Affairs Board in the Federation of Rhodesia and Nyasaland. The Board was a Standing Committee of the Federal Assembly and consisted of six members, three Africans and three Europeans. Its general function was to make representations to the Federal Government on matters affecting the interests of Africans. It also had the particular function of drawing attention to any Bill or subordinate legislation considered to be a "differentiating measure". A differentiating measure was one "by which Africans [were] subject or made liable to any conditions, restrictions or disabilities disadvantageous to them to which Europeans [were] not also subjected or made liable," or one "which [would] in its practical operation have such an effect".[10] The Board had the power to present to the Assembly a statement giving reasons why it considered a Bill to be a differentiating measure. If the Bill which the Board so considered was passed, the Board could submit a request for it to be reserved, and the Governor-General was normally obliged to comply with the request.[11] Basically, this institution, the African Affairs Board, worked on the same principle as the Kenyan Council of State.

The Monkton Commission in 1960, having decided that discrimination was present in some form -directly or indirectly - in every sphere of human activity, recommended the establishment in the African colonies of Councils of State on the model of

---

10 The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 (S.I. 1953, No. 1199), Annex. Art. 71 (2).

11 Ibid., Arts. 74 and 75. There were other powers of the Board which are not relevant here. See S.A. de Smith, op. cit., 95 et seq.

the Kenya State Council. The main function of such councils was the review of proposed legislation and they would be empowered to delay its passage if it was unfairly discriminatory.[12] In Northern Rhodesia, the Constitutional Council was established by the 1963 Constitution but was abolished on the gaining of independence. Instead, an ad hoc special tribunal was to be set up wherever there was a request for a report on a bill or statutory instrument whose provisions were considered to be inconsistent with fundamental rights provisions in the Constitution.[13] The function of the special tribunal is to scrutinise discriminatory provisions of a bill or instrument and to report with reasons to the President and the Speaker of the National Assembly. The tribunal consists of two persons who hold or have held office as a Judge of the High Court, appointed by the Chief Justice.[14] A request for a report on a bill or statutory instrument must come from at least seven members of the National Assembly by notice in writing delivered to the Speaker of the House within three days after the third reading in the case of a bill and to the appropriate ministry within fourteen days of the publication of the statutory instrument in the gazette.[15]

Institutional safeguards also appear in other forms in other

---

12 Cmnd. 1148 (1960), paras. 240 - 250.

13 Zambia Constitution, 1964 Art. 27 (as amended) cited in Aihe, loc. cit., 626,

14 Idem.

15 Ibid., 627.

jurisdictions. As has been seen elsewhere,[16] there is no judicial review of legislation in France and no court can declare unconstitutional any law of the French Parliament. The French Constitution provides for scrutiny of legislation before promulgation by an extra-judicial body called the Constitutional Council.[17] The Constitutional Council consists of nine members, three nominated by the President of the Republic, three by the President of the National Assembly, three by the President of the Senate.[18] In addition, former Presidents of the Republic are ex-officio life members of the Constitutional Council. The Council's president is appointed by the President of the Republic.[19] The Constitutional Council has various functions.[20] All "organic laws" must be submitted to it before their promulgation.[21] Other bills may be submitted by the President of the Republic, the Prime Minister, or the President of either Assembly. The declaration of the Council is final and may not be appealed against.[22] A provision declared unconstitutional by the Council cannot be promulgated or applied. If the Constitutional Council does not declare

---

16 P.169, ante.

17 The Constitution of the Fifth French Republic, Arts. 56 - 64.

18 Ibid., Art. 56.

19 Idem.

20 E.g., supervising the election of the President (Art. 58); deciding, in disputed cases, on the regularity of the election of Deputies and Senators (Art. 59); supervising the conduct of referenda (art. 60).

21 Art. 61

22 Art. 62.

a measure unconstitutional, there is no other way of challenging legislation.

B. A Constitutional Council For Fiji

Fiji needs an institutional safeguard to ensure protection for fundamental rights. It could take the form of a Constitutional Council [23] which could scrutinise proposed legislation, and possibly legislation passed prior to the establishment of the Council to ensure, as far as humanly possible, that the measures do not contravene the fundamental rights provisions of the Constitution.

The proposal will be examined under four heads:

(1) The nature and general function of the Council.

(2) The powers and particular functions of the Council.

(3) Composition of the Council.

(4) Proceedings of the Council.

(1) The Nature and General Function of the Constitutional Council

The success of the Council will depend largely on its nature and function. The Kenya Council of State and the African Affairs

---

23 Hereinafter the proposed Constitutional Council will be referred to as "the Council". The proposals are closely related to the operation of the Kenya Council; see Ghai, loc. cit., 1091 et seq.

Board may usefully be contrasted.

> The African Affairs Board emerged very much as a political body. It was part of the legislature, and there was no security of tenure of the members, as they lost their membership if they failed to get re-elected to the legislature. In Kenya, the Council [of State] was thought of more as a quasi - judicial body. There [was] the Council's complete separation from, and independence of, the legislature; there [was] security of tenure and non-sectional principle of representation. The Council was set up to safeguard the interests of all races, whereas the Board was confined to look after the interests of the Africans only ....
>
> The Board took the view that their function was merely to label Bills as discriminatory or otherwise, and not to judge as to the desirability of discrimination .... The Kenya Council, on the other hand, felt that it was its duty to look into the merits of the legislation, and to reserve because of discrimination only if it was unfairly so.[24]

Any Council established in Fiji should be modelled on the Kenya Council which approached its tasks by recognising that some derogations from fundamental rights are not necessarily bad. They may be beneficial, though prima facie discriminatory. If the object of legislation is equalisation, an attempt to achieve social justice, the legislation should not be condemned outright.[25] Such legislation may be reasonably justifiable[26] or may satisfy the

---

24 Ghai, loc. cit., 1124 - 1125.

25 Ibid., 1126. See also A.M. Honore, "Social Justice," (1962) 8 McGill Law Journal 77.

26 As to the meaning of the term "reasonably justifiable" see p. 435, ante.

other requirements of the Constitution as being for the public benefit, public interest, and so on. Once it is admitted, as in the exceptions in the provisions containing the constitutional guarantees, that some discrimination or other derogation from basic human rights is permissible, the Council in Fiji should be given the power to determine whether the derogation is justified. If the Council were merely to label a measure as being in derogation of a constitutional right without commenting on its merits, it would always be possible for the government or other authority initiating the reference[27] to the Council to dismiss the objections of the Council by asserting that the measure was justified under one of the provisions of the Constitution. This would defeat the purpose of having an independent body to advise whether legislation was unconstitutional. The Council should be empowered to examine legislation from all points of view and take account of relevant social and economic factors and conditions prevailing in the country. The powers of the Council should not exclude the right of the courts to pronounce upon the validity or otherwise of legislation. The Council would have to consider the practical effects of the measure, in addition to the actual words. This would preclude the legislature from doing indirectly what it could not do directly.[28] The Council would also examine the purpose and policy of the measure. By so doing, it would be able to determine whether the derogation from fundamental rights had a reasonable relation to the object sought and whether it fell

---

27 As to this see p. 532, post.

28 The court will follow the same approach; see Pillai v Mudanayake [1953] A.C. 514.

substantially within the exceptions to the basic rights provisions.

These functions would impose a heavy duty and responsibility on the Council, but it would be a duty which the Council would, as will presently be seen, be well suited to discharge. In many ways the Council would have an advantage over the courts in that it would not be bound by precedents and would be able to consider every measure on its own merits. It would be free from the technical rules of evidence and court procedures. There would be no restrictions on its seeking expert advice or making its own independent enquiries.

(2) The Powers and Particular Functions of the Council.

(a) In the Legislative Process

At the outset it must be made very clear that the Council is not intended to be in effect a third chamber. The powers and functions of the Council would not be such as to impair the legislative authority of the Parliament itself. The Council would act in an advisory capacity, its three main functions being:

(i) to consider and report to either House of Parliament on a Bill referred to it by the House concerned; the Council would be asked whether the Bill contravenes or is likely to contravene any of the fundamental rights provisions;

(ii) to consider and report to the Minister concerned, or the authority or local body concerned and/or the House of Parliament concerned, whether any subordinate legislation contravenes or is likely to contravene any of the fundamental

rights provisions;

(iii) to give assistance to the House of Parliament or a Minister in matters touching the fundamental rights provisions.

(i) Bills

Provision should be made to enable the Council to become seized of a Bill in three ways:

Reference by House of Parliament

Provision should be made for a Member of Parliament to move before the third reading that, because the proposed legislation contravenes or may contravene any provision relating to fundamental rights, it should be referred immediately to the Council. The reference would be made only if the motion were supported by at least twenty-five per cent of the total members of the House. The Council should then meet to scrutinise the measure within such time as may be prescribed by the House, being not less than 21 days. The Council would report to the House of Parliament concerned, stating whether in its opinion and for the reasons set out the measure does or is likely to contravene any provision relating to fundamental rights. Once this statement was laid before Parliament, the House concerned would be unable to proceed to the third reading unless the Council, having scrutinised the measure further, had either withdrawn its previous statement or laid before the House a report embodying its comments upon the Bill or any provision thereof. The report would, if the Council thought fit, contain recommendations for revision of the measure by amendment, deletion, or replacement

of any of its provisions, or by addition of new provisions which would remove the grounds for objection to the measure.

Such a detailed report would need to be made by the Council within two months of lodging its initial objection, but this period could be extended by the House. However, if the House is not in session, the presiding officer of the House, or if Parliament is in dissolution, the Governor-General could extend the period to the next sitting of the House. However, in the case of the consolidated fund or appropriation bills the time prescribed for consideration by the Council would be reduced to one month and any extension granted would not exceed three weeks. If the matter were very urgent and one which pertained to public defence, public order, public security or a period of public emergency within the meaning of section 18 (6) of the Constitution, the House might prescribe a shorter period for the presentation of the initial statement or the detailed report by the Council.

On the presentation of the Council's report, the House concerned would be obliged to consider it and to certify its decision upon it to the Council. If the House did not agree with the opinion of the Council contained in the report, it should within 7 days of its decision thereon remit a copy of the report and its decision thereon to the other House of Parliament. By this method the other House would at least have before it the opinion of the Council and its reasoned report and could make such use of the report as it deemed fit.

However, it is submitted, the matter should not end there. Should both Houses of Parliament pass the measure in the face

of the objections of the Council, the public should be informed of the Council's report. It is therefore suggested that the Speaker of the House of Representatives and the President of the Senate in certifying the enactment of the measure should be required also to certify as to the objection of the Council. After all the whole idea of this institutional safeguard is to prevent, as far as possible, a measure reaching the statute book which may later be found to be unconstitutional for infringing the fundamental rights provisions. If, in spite of all the scrutiny examination and investigations made by the Council, the measure should find its way to the Governor-General for his assent, that measure should be judicially adjudicated upon at an early stage. Accordingly, it is suggested that the Governor-General should be required to refer the "Act" to the Supreme Court for an advisory opinion on its constitutionality. This procedure would be in keeping with democratic principles and would also keep the head of the state out of political controversy. The final decision would be made by normal but early adjuciation by the judicial process.

(b) At the initiative of a Member of Council

The Council might become seized of the matter on the initiative of a member of the Council who was of the view that a particular Bill before either House of Parliament might contravene the fundamental rights provisions. Of necessity, it would be provided that each member of the Council be given a copy of all Bills presented to Parliament within the same period as they are supplied to members of Parliament. If any member felt that a Bill contravened the fundamental rights provisions, he should be able to call a meeting of the Council to scrutinise the

Bill. If the Council decided that the provisions in question were contravened or were likely to be contravened, the Council would follow the same procedure as if the matter had been referred to it by either House of Parliament. The provisions already discussed relating to report and statement would apply. However, there should be nothing to compel the Council to scrutinise any Bill on its own volition,[29] but if at least two members so wished, the Council would be bound to scrutinise the measure.

In this field, it is contended, the powers of the Council should be extended to existing legislation and subordinate legislation of all kinds. The Council should be given the power to scrutinise existing legislation to bring it into harmony with the Constitution as far as it relates to fundamental rights. The Council, after scrutinising existing legislation, would be entitled to make such recommendations as it deemed fit to the appropriate Minister or other relevant authority. If the Minister or other relevant authority ignored the recommendations of the Council and/or did not take active steps to the satisfaction of the Council to comply with the recommendations within three months of the report, the Council would then present a report, together with a copy of its recommendations and its reasons thereon, to Parliament as soon as practicable. However, here again there should be nothing to compel the Council to scrutinise existing laws.

(c) <u>At the Initiative of a Member of the Public</u>

The Council might become seized of the matter on the initiative

---

29 If such was the case, many complications would develop. For instance the Council may be subjected to numerous applications for mandamus.

of a member of the public. Any member of the public should be able to write to the Council or to any of its members drawing attention to an alleged breach of fundamental rights provisions in a Bill. Any member of the Council could then call a meeting of the Council to scrutinise the Bill. If the Council agreed that the fundamental rights provisions were likely to be adversely affected, it would follow the same procedure as if the matter had been referred to it by either House of Parliament. Should the Council disagree with the view of the member of public and dismiss the representations so made, its decision would be final and not subject to appeal nor be able to be called in question in any court of law. This is quite reasonable as confidence should be reposed in the members of the Council. If they considered that a "complaint" was without substance or frivolous, the Council should not dwell further on it. In any event, if the member of the public was not satisfied, and he felt that there was validity in his representations, he could air his views through his member of Parliament. If the representation were valid enough to gain the support of the necessary twenty-five per cent of the members of the House, and the House of Parliament referred the matter to the Council, the Council would be bound to scrutinise the measure further.

(ii) Subordinate Legislation

If the Council considered subordinate legislation[30] to violate or be likely to violate the fundamental rights provisions, the

---

30 Which includes statutory rules, regulations, and by-laws of all kinds.

Council should have similar powers to those in relation to statutes. The Council should be empowered to send to the authority concerned, and the Minister under whose portfolio such authority came, a report of its views on any subordinate legislation which was thought to contravene the Constitution. The Council could recommend the annulment, if possible, or the amendment of the legislation. If no steps were taken to comply with the recommendations to the satisfaction of the Council within two months of the report, the Council should make a report to Parliament. In the case of subordinate legislation, the Council would be taking action after the law had been passed. As will be seen presently, there would be nothing to prevent the Minister or the local authority or any other authority concerned from approaching the Council for advice before promulgation or even during drafting of legislation.

In the case of subordinate legislation too, the Council might be seised of a matter in one of three ways:

(a) First, if one third of the members of a local authority or such other body having power to make subordinate legislation were to question whether a proposed measure contravened the fundamental rights provisions, the matter should immediately be referred to the Council by the authority concerned. The provisions relating to references by the Houses of Parliament would apply mutatis mutandis.

(b) Secondly, the members of the Council themselves might feel, as in the case of Bills, that certain subordinate legislation needed scrutiny. In such cases too the provisions relating to Bills should apply mutatis mutandis.

(c) Thirdly, a member of the public might make representations. In such cases too the provisions relating to Bills would apply mutatis mutandis.

(iii) General Assistance

It is submitted that the Council should have the general function of giving assistance to the Houses of Parliament or to a Minister in matters touching the fundamental rights provisions generally. This would be a very helpful and practical function of the Council. It would provide an opportunity, before a bill was presented to the House, for the Minister concerned to discuss and consult the Council. Such matters as the reasons for the Bill, its probable effects and the amendments acceptable to the Council and the Minister could be discussed and settled. This would obviate embarrassment and delay, and formal interventions would be fewer. This would be of particular importance in relation to subordinate legislation. Such legislation does not receive the same scrutiny as a Bill does in Parliament. The Council could be of immense assistance to the Minister. But, it would need to be expressly provided that such consultation, advice and assistance would in no way prejudice the Council in its formal consideration of any Bill or subordinate legislation referred to it. The Kenya Council of State reported:[31]

> This growing tendency to consult the Council in the early stages of legislation may well obviate subsequent delays in the passage of legislation and should prove beneficial, provided that the Council is not expected to prejudge any

---

31 Annual Report, 1959 at 6, cited in Ghai, loc. cit., 1099.

decision which it may later have to make in the light of grounds for objection put forward by the public when the legislation is published.

(b) In the Enforcement of Fundamental Rights

Fundamental rights are meaningless unless they are protected. The fundamental rights provisions of the Fiji Constitution are intended to be justiciable, not hortatory. They enjoy an entrenched position; they cannot be changed by any ordinary majority of the legislature. But they are meaningless unless the individual is able in fact to enforce them through the legal process. The Constitution of Fiji, enables an aggrieved person to apply to the Supreme Court to have his fundamental rights enforced or to seek redress for their breach. In practice, the effectiveness of this provision may be greatly diminished if the victim is unable to make the necessary application because he is impecunious. Sections 3 and 15 of the Constitution confer equal protection on every individual but only those with superior economic resources will be able to enforce their rights through a solicitor. What of less fortunate individuals who are unable to pay for this service?

In order to make the fundamental rights provisions effective, the state must do its utmost to ensure that all are placed on the same footing in the enforcement and enjoyment of their rights. Because they are rights and freedoms which are intended to be universal as well as fundamental, the principle of equality before the law demands that courts of law should be accessible to all, without discrimination, who wish to enforce their constitutional rights. Having the courts open to all may not in itself be enough. Equality is not achieved if an impecunious person is

at a disadvantage in civil litigation involving his fundamental rights.[32] Though the doors of the courts may be wide open the impecunious person may be unable to enter because of the cost of litigation in the Supreme Court. For him, the courts are not "accessible". Vis-a-vis someone who is well of financially and able to have legal representation, he can hardly be said to have equal access to the courts in the real sense. His inability to employ counsel is a serious handicap. Though he may have a meritorious claim or a valid defence his ignorance of the laws of evidence and procedure preclude it being presented. The indigent may sacrifice his claim or defence. Whatever rights he may have to equality before the law are rendered illusory.

It is submitted that in order to achieve equal justice and protection of the law to all and to give reality to the constitutional guarantees, a legal aid scheme providing help for impoverished litigants may have to be devised. Otherwise justice would become a privilege of the wealthy. Here the Constitutional Council[33] could be usefully employed to determine whether legal aid should be given.

The Council ought not to be directly involved in enforcing the fundamental rights provisions. This would be likely to prejudice the Council as a disinterested body. The Monckton

---

32 A legal aid scheme in criminal proceedings operates in Fiji although not to the extent desired. It is difficult to qualify for legal aid assistance in magistrate's court trials and is very seldom granted.

33 See p. 528 , ante.

Commission Minority Report (by Chirwa and Habanyama) said:[34]

> While we are prepared to accept the majority view that the Councils of State should not deal with individual cases we think there is room for the Councils to play a part in enforcing the provisions of the Bill of Rights prohibiting racial discrimination in cases which affect a community or substantial group. For this purpose we think the Councils should be empowered to initiate action in court in the interests of the public. We think this would help to overcome the difficulty that there is no effective scheme for legal aid in the Federation, and the average African, who may be the victim of discrimination, cannot afford to pay for the services of a lawyer.

Such a proposal should not be adopted in Fiji. In view of the suggestions[34] that the Governor-General should be able to apply for an advisory opinion of the Supreme Court, it is not necessary to endow the Council with similar powers which would involve it in legal proceedings prejudicing its impartiality. Other complications would also arise. On what basis and at whose expense would the Council secure legal representation? If the Council were to refuse to assist one group while acceding to the request of another, its decisions might be misunderstood. The Council must be seen as an advisory and independent body and should not become directly involved in litigation.

However, the Council might perform a useful function within a legal aid scheme under which individuals might, in appropriate cases, be given legal aid to apply to the Supreme Court under section 17 of the Constitution. Assistance from the scheme would be limited to persons with less than a specified income. The system would enable all persons to lodge a written application

---

34 Cmnd. 1148 (1960), para. 54, cited by Ghai, loc. cit., 1132.

with the Council giving a brief statement of their financial circumstances and the alleged breach of the fundamental rights provisions. The Council would scrutinise the applications and, with the assistance of the two legally qualified members,[35] certify whether there was a substantial cause for complaint. In appropriate cases, the Council would then issue the necessary legal aid certificate. The granting of the certificate or dismissing of the application would be in the absolute discretion of the Council. There would be no right of appeal.

By making a Council certificate a pre-requisite to the granting of legal aid, many frivolous and groundless applications could be excluded and the abuse of the process and the legal aid scheme would be minimised. Once the certificate is granted, the current legal aid scheme as operating in criminal cases, would apply. Should the applicant, supported by legal aid, be successful, any costs awarded must be paid to the legal aid account.

(3) Composition of the Council[36]

As has been said, the nature and functions of the Council would be very important factors in determining its success. Of equal importance is its composition. The Council should not

---

35 See the suggested composition of the Council at p.543, post.

36 Cf. the Kenya Council of State under the Kenya (Constitution) Order in Council, 1958 (S.I. No. 600) - hereinafter referred to as the 1958 Order.

emerge as a political body. If it did, it would be very susceptible to the influence of the ruling party. It should be formed and act independently of politics as far as humanly possible. Hence there should be no election to such a body but membership should be by appointment.

The members of the Council should be appointed by persons whose positions are such that they are outside politics and who could be expected to command the respect of the country at large. Two who fall into this category are the Governor-General and the Chief Justice. These two officers should be responsible for the appointment of the members of the Council.

The Council should consist of a chairman and four other members. The chairman and at least one other member should be a barrister and solicitor of at least ten years' standing, or a retired judge or a retired magistrate.[37] No person should be eligible for membership of the Council who is a member of Parliament or who has been such a member within twelve months prior to his appointment, and any person so appointed as a member of the Council should not be eligible to be a member of either House of Parliament either during his membership or the Council or within twelve months after the termination of his membership either by resignation, dismissal or expiry of term. No civil

---

37 As will be seen later, the powers and functions of the Council will be such that in certain major aspects legal training and experience on the part of some members would be of great importance. Accordingly, it is imperative that at least some members must be lawyers.

servants or other persons employed by Her Majesty's Government should be eligible for membership. This would ensure that members would not be susceptible to the influence of the ruling political party. To maintain continuity, appointments should be for five years.

The Chairman of the Council should be appointed by the Chief Justice and the other four members by the Governor-General.[38] It is most important that these appointments be made without regard to race. For too long - in fact from the beginning of British rule in Fiji - people have been made to think on racial lines. This racial concept has been perpetuated even in the present Constitution. The colonial regime did very little to unite the various races in Fiji into a common sentiment. As has been seen,[39] official encouragement has been given to communal divisions, e.g. by separate representations and separate schools. This has accentuated the gap. British rule, throughout its history has repeatedly encountered the communal problem but it did very little to resolve such problems in Fiji. It is high time that steps were taken to eradicate, albeit gradually, this concept of racialism. People's way of thinking and actions ought to be moulded more on national lines, with the idea of working for the common good of the country, and not on racial distinctions.

Accordingly, it is submitted, the establishment of this Council would provide an opportunity to make a break with the

---

38 Appointments by these two officers would reflect the independent nature of the Council.

39 Pp. 436 et seq., ante.

principle of communalism. It should be a non-racial body with the task of safeguarding the interests of all races.

(4) Proceedings of the Council

It is imperative that initially the Council should meet at least three times a year in order to establish itself quickly. To do this, the Council could begin by examining all legislation prior to 1970 to satisfy itself that such legislation is in harmony with the Constitution. This in itself would be not only worthwhile but educative - both of the Council and the people. The constitutional guarantees of fundamental rights are an innovation in Fiji. None of the governmental agencies - the legislature, the executive or the judiciary or the people of Fiji generally have had much experience with them. To have the Council peruse all previous laws and report on them would provide an opportunity for the government and the people to become better informed as to the scope of the constitutional protection now available. The proceedings in the Council should be conducted in committee initially. At those meetings the quorum would be three. If the Council, having met in private, were of the view that a prima facie case had been made out that the provision of a law or proposed law contravened or was likely to contravene any fundamental right provision, a motion to this effect could be debated subsequently at a public meeting. In finding a prima facie case the Council need not be unanimous. A prima facie case could be treated as having been made if at least two members were of that view. If the Council held that a prima facie case had not been made out, it should dismiss the "complaint", and that decision should be final and not subject to any judicial proceedings what-

soever.

Notice of a public hearing together with an indication of the business to be discussed should be given by the Council. This would give all interested parties full opportunity to make representations to it. Submissions could be made orally or in writing. In Kenya, a Minister or Assistant Minister (later called "parliamentary secretary") had a right to attend and take part in the public proceedings of the Council of State [40] but without the right to vote. This course should not be followed in Fiji because it might suggest that the Council was an agency of the government or that it might be unduly influenced by the government of the day. The right of a Minister or Assistant Minister to make representations should be no greater than that of other members of the public. The purpose of such a Council to act as a watch dog over the legislative actions of the state - whether of the legislature itself or of subordinate legislative agencies. It is important that the Council should act as independently of such bodies as possible. No doubt the submissions made by a Minister would be very helpful in evaluating proposed legislation or legislation already in force. But nonetheless any right of representation permitted to the government should be no more than that allowed to other interested parties. The Council should not only act independently but should be seen to do so. The functions and operations of the Council would be greatly undermined if the impression was created that it was an agency of the government and used merely for window dressing.

---

40 1958 Order, s. 52 (6).

However, this does not mean that the Council should be prevented from inviting persons to attend its meetings and even participate in the discussions. This, at times, might prove to be a very useful exercise. For instance, a Minister might be invited to explain the reasons for and the probable effect of a measure, or a head of department or other civil servant might be invited to explain the practical operation of certain subordinate legislation.

At the public hearing the Council should be at liberty to receive and hear sworn testimony, or it could conduct the hearing in the form of oral or written submissions. After the public hearing the Council should retire and conduct its own deliberations in private.[41] The decision of the Council should be by majority vote with the chairman having a casting vote only in the case of equality of votes of those present and voting. Voting by proxy should not be allowed. Because of the importance of the subjects discussed only members present at the discussion should be able to vote.

If the Council ultimately decides that a measure does or may infringe a fundamental right provision, it should make a preliminary statement to the House of Parliament concerned.[42]

---

41 Cf. the position of the French Constitution Council where there is secrecy of deliberations and of votes. See M. Waline, "The Constitutional Council of the French Republic," (1963) 12 Am. J.C.L. 482, 487.

42 See p. 532, ante.

The Council would then prepare and formally adopt the necessary report, giving its final opinion on the measure with the reasons, and possibly recommending amendments. This report would then be considered by the House concerned.[43] Even if a motion were not adopted after the public meeting but the Council entertained strong doubts about the measure, it could still make a report either to the House or the appropriate Minister or authority concerned.

Needless to say, the Council should be protected from actions for contempt and should enjoy privilege as regards its proceedings, reports and records.[44] Within the statutory provisions, it should be given absolute discretion to make its own rules for its proceedings and procedure.[45] Except for public hearings, all other business of the Council - e.g. consultation with a Minister or other authority and advisory opinions sought by a Minister, should be conducted in private.

Conclusion

The most obvious effect of having such a body as the suggested Council would be to minimise the possibility of having

---

43 See p. 533 , ante.

44 Cf. Kenya (Constitution) (Amendment) Order in Council 1959 (S.I. No. 1302), s. 5.

45 The Kenya Council of State adopted the rules of the Legislative Council, with some modification. When in Committee it worked in less formal way; Ghai, loc. cit., 1098.

legislation enacted in derogation of the constitutionally guaranteed fundamental rights. Draft legislation would not only be debated and adopted by Parliament; there would also be scrutiny by an independent body without political motivation. Since the Council would be responsible to the Governor-General, it would not be subject to the influences operating on members of Parliament. The Council should provide standards by which legislation would be judged objectively without political pressure.

The existence of a Council would encourage the government to proceed with care when drafting legislation which might affect fundamental rights. The implications of draft legislation would be closely investigated before the bill was introduced. There would then be less risk of legislation being challenged as unconstitutional. One important consequence of this would be an improved atmosphere for foreign investment, which must be encouraged.

The Council might also assist in settling the terms of legislation which may affect racial issues. Discriminatory legislation could be at least partially removed from politics and particularly party politics by having it considered by the Council which would provide a forum where all interested parties could be represented and make submissions. The Council's procedure would ensure a fair hearing for all. The Council would approach legislation referred to it in a spirit of impartiality and fairness. Its final deliberations would be in private and whatever was said by the members would not then have to be to "satisfy" any section of the community or authority.

The fact that Fiji has constitutionally guaranteed rights should

not be used as an argument against appointing a Council. There may be an overlap of functions between the Council and the Courts, but it is not because of any lack of faith in the judiciary that the appointment of a Council is supported. The role of the judiciary is narrower than that of the Council.[46]

There are further reasons for establishing a Council. First, once a bill has been drafted and when it is enacted, attitudes harden. Members of the government will feel obliged to support and justify the legislation even though they may privately concede that the law should be modified or diluted. Once the Bill becomes law the government become fully committed to it, but before that happens a more flexible position may be taken. Amendments might be accepted if they were put forward by an independent body such as the Council whose obvious impartiality and fairness would be recognised.

Secondly, the courts in Fiji cannot take preventive measures. They cannot offer advisory opinions to the legislature on matters pertaining to fundamental rights. The judiciary can act only when a definite complaint that fundamental rights have been contravened or are likely to be contravened. These limitations would not apply to the Council. The Council would have fact-finding and investigation facilities that the courts do not have. Whereas the courts function is to decide cases according to law, there is no constitutional or doctrinal objection to the Council advising the government on the content of legislation infringing the fundamental rights provisions or even advising the government on the form of

---

46 Pp. 528 et seq., ante.

legislation. In its advisory and consultative role the Council's activities would be valuable and beneficiary. Much time and effort would be saved were the government to consult the Council in the early stages of drafting legislation. Moreover, the Council, with its reputation for impartiality and fairness, would be able to give frank and open advice and the government by referring to the Council such matters in the early stages, would be able to demonstrate its good faith and honest intention.[47]

The Council would also reduce or avoid conflict, such as was seen in the United States and India, between the legislature and judiciary. In the United States during the New Deal era, there was constant conflict between the judiciary and the legislature. In India, this problem manifested itself from the beginning of independence and within a year and a half of its commencement, as a result, the Constitution of India was amended in order to nullify the effects of certain judicial decisions and to forestall future judicial action.[48] The Supreme Court, concerned about clashes with the legislatures, felt compelled to state:[49]

> [W]e think it right to point out what is sometimes overlooked, that our Constitution contains express provisions for judicial review of legislation as to its conformity with the Constitution .... If, then, the Courts in this country face up to such an important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution.

---

47 See Ghai, loc. cit., 1123.

48 The Constitution (First Amendment) Act, 1951.

49 State of Madras v Row, A.I.R. 1952 S.C. 196, 199.

Such a conflict must be prevented in Fiji. But it must also be accepted that, if the validity of legislative or executive action should be questioned in relation to the fundamental rights provisions, the courts would be bound to adjudicate on it. The problem would be most acute in relation to section 15 of the Constitution under which the court must decide whether a discriminatory law is reasonably justifiable in a democratic society. This will certainly call for adjudication on racial, political and social questions. It is not suggested that the courts are unqualified to answer such questions, but there is a real danger of conflict with other branches of government. In this very controversial field, the courts have a difficult task to discharge, as the American and Indian experiences have shown. The Council could be of immeasurable assistance to the courts and the legislature alike by ensuring that as little doubtful legislation as possible is included in the statute book.

Furthermore, the Council would not be bound by technical rules of evidence and procedure in scrutinising a discriminatory bill to see whether it is reasonably justifiable in a democratic society. It would be able to look at the history of the bill and examine its objects and effects in practice. It would be able to receive representations and views from those adversely or favourably affected. It would be able to invite opinions and views from other experienced people. Eventually the Council might be able to strike a compromise between opposing views and recommend the necessary amendments to the Minister or other authority initiating the reference to it. Certainly such a recommendation would carry much weight even though the Minister or the authority, as the case may be, may not accept

it. These are the spheres - and very important and realistic ones - which the courts are not able to enter. If the legislature, despite the Council's objections, passed the measure, the court would feel "bolder" and less hesitant to attack a measure and declare it unconstitutional. The court would feel that it had at least the backing of another independent body. On the other hand, if a measure were approved by the Council, this too would be likely to carry great weight with the courts. It is only where a measure is invalidated that conflict really arises between the court and Parliament. Having an ally in the Council would be of invaluable assistance to the courts. It would encourage and make the courts feel more secure in the performance of their duties in the constitutional field of fundamental rights.

It may be said that because the Council might clash with the expressed wish of the freely elected legislature, it would be inimical to the democratic spirit. But, it is submitted, Fiji is not a pure democracy. It may be correctly asserted that a country like New Zealand is ruled according to the will of the people through their duly elected representatives and one may agree, in relation to New Zealand, with Professor Sir Ivor Jennings when he says that the surest safeguard of a nation is free elections. That safeguard may exist where the society is fairly homogeneous. But in Fiji representation in the House of Representatives is on a communal basis and this is bound to affect the attitude of members of the House. As has been seen elsewhere, this unfortunate state of affairs has been present in the country from the early years of British rule. Also, in the Senate no member is elected by the people in "free elections"; all are nominated. Here too party politics and communal factors are

prominent.[50] No matter how much leaders and people may deny that politics in Fiji are played on a communal basis, in practice the racial element is always present, and significantly so. Communal appeals form the very basis of politics in Fiji. Hence there are permanent communities with separate representation.[51]

In such a context there is need for an independent body like the proposed Council, which may well be seen not to be inimical to the democratic spirit. As proposed, the Council would have no powers to act contrary to the wishes of those representing the people but it could be expected to advise and influence Parliament.

---

50 See s. 45 (1) as to the appointments to the Senate.

51 See p. 703, post.

CHAPTER XV

PROPOSED STATUTORY ENFORCEMENTS

One of the shortcomings of the fundamental rights provisions in Fiji is that they do not apply to the conduct of private persons unless their conduct can be classified as State action or as related to a public function. The members of the Commission reporting on the Constitution for Basutoland (now Lesotho) were particularly concerned about the same problem and suggested that the activities of private persons and bodies could present a greater threat to individual liberties than the activities of governmental agencies.[1]

Fiji as a multiracial country was seen to need a Bill of Rights.[2] But the Bill of Rights is not a panacea. It has little or no effect on private relationships in the social, economic and political life of the community.

> An elite- an educated class with knowledge of government - can provide leadership. Controls or checks and balances can be written into the charter so as to curb legislative, executive and judicial power. Yet they have force and

---

1 D.V. Cowen, "Human Rights on Contemporary Africa", (1964) Natural Law Forum 1, 7 - 8, where the learned writer quotes what a leading politician said:

> I am aware that an American-style Bill of Rights is designed to place limits upon what organs of government may competently do, but I have some difficulty with this. At the present stage of our development in Basutoland I do not think that our prime need is for protection against governmental organs; the need is rather for protection against powerful private interests .... The real trouble here is that the churches have too much power, and so too, do the Chiefs and so do the white traders ....

2 See p. 431, ante.

> meaning only if the consensus that brought them into being is a consensus that suffers them to be a way of life.[3]

This statement encapsulates the significance of the Bill of Rights in the Fiji Constitution. A Bill of Rights marks a start towards achieving a successful society where diversities in ideas, race, culture and creed can exist and flourish side by side. It enshrines the ideals to which appeals can be made to resolve opposing views and conflicts. It may serve also as a reminder and guideline to officials and governmental agencies generally and that it may not be safe to go beyond certain limits in the exercise of their powers. But the development of tolerance of other viewpoints and the acceptance of racial and cultural differences requires time and patience. This is particularly so in Fiji where thinking and acting on racial lines has been widely accepted for so long.

The true spirit and high ideals of the fundamental rights provisions cannot be attained unless and until the golden thread of the Bill of Rights is made to run through the fabric of private actions, as well as those of government. The more we encourage and cultivate pluralistic tendencies in the private walks of life, the greater will be our ability to manage the critical affairs of the whole nation. In the Fiji Constitution we have enshrined the ideals of a successful community; but regrettably not much has been done to educate the people at large to accept the ideals

---

3 William O. Douglas, "The Bill of Rights is not Enough", in The Great Rights edited by E. N. Cahan (1963), 118.

and act accordingly. They have not yet seen the fundamental rights provisions as a means of creating a tolerant society. Only if this is done will the various communities in Fiji become one society.

Accordingly, it is submitted, the fundamental rights provisions should be extended to include private actions of individuals. Perhaps some of the actions of officials in governmental agencies should also be covered. Here, the American experiment has much to offer our new nation. In the United States, the Constitution makes provision for "equal protection of the law" and "due process of law", which have provided great safeguards. But there were also various limitations on private action which resulted in discrimination. Congress dealt with the situation by ordinary legislation in the form of civil rights legislation.[4]

It is of utmost importance that the Fiji Parliament should pass similar legislation. There ought to be legislation prohibiting discriminatory practices in the social and economic spheres in particular. In Fiji there is no race relations legislation,[5] and even the Constitution significantly omitted, except to a very limited extent,[6] provisions prohibiting discrimination by individuals. Such legislation is necessary for the building of a truly

---

4 See Gunther and Dowling, op. cit., 871-978.

5 Except perhaps pertaining to sedition under s. 59 (1) (iv) and (1) (v) of the Penal Code (Ch. 11 of the Laws of Fiji) which provide that:

(1) A 'seditious intention' is an intention - ...
(iv) to raise discontent or disaffection amongst Her Majesty's subjects or inhabitants of Fiji; or
(v) to promote feelings of ill-will and hostility between different classes of the population of Fiji.

6 Constitution, s. 15 (6).

harmonious multi-racial society and the consequent prevention of major racial problems such as have occurred in other countries. The need transcends party politics. A Bill of Rights which is limited to state action falls far short of what is required. The relative novelty of the Bill of Rights makes it likely that it will take at least another generation before the people fully understand and accept the principles embodied in it. An attempt should therefore be made now to enact race relations legislation.

In a harmonious society and country like New Zealand, where there has been very little evidence of strictly racial problems, legislative measures have been adopted. The Maoris and the persons of European descent have got along reasonably well.[7] Though there have been isolated incidents of racial discrimination, particularly in the field of housing, it could not be said that a racial problem existed. Nevertheless in 1971 the New Zealand Parliament saw fit to pass the Race Relations Act to control racially discriminatory practices, particularly in the social and economic spheres.

Fiji, by comparison, has a stronger case for legislative action on race relations in addition to the Bill of Rights of the Constitution. It is imperative that any constitutional guarantee of fundamental rights designed to protect the rights of the individual be accompanied by means for their enforcement. Without this, guarantees are doomed to failure no matter how noble

---

7 Cf. the Honourable Mr Rata (a Maori) who stated in the New Zealand Parliament (Hansard (1971), p. 1702 col. 2.) :

> Racial discrimination does not happen here in the blatant way it occurs overseas. This country faces what is more of a social problem.

the motives behind them.

In recent years, a sense of insecurity has been created in Fiji by remarks and statements with racial connotations. Protest marches and public meetings with communal appeals and racial divisions cause insecurity, which result in psychological and social depletion which in turn diminishes local initiative and the incentive for improvement. Consequently, the country suffers.

There is an ever-present possibility that at some point the race which has become the target for such activities may tolerate abuses no longer and take counter measures. This would obviously not be in the interests of the country. What has been said is believed to be a realistic assessment of recent trends in Fiji. It is obvious that the existing legislation and the fundamental rights provisions are inadequate for dealing with the situation. There is certainly a continuing demand in the public interest for the easing of social tensions created by the existence of different racial groups in a single society in Fiji. Now is the time to identify that interest and make it a part of public consciousness. Just as a single sugar cane strike in 1961 stimulated a long needed revision of the sugar industry laws in Fiji, the present situation dramatises communal problems.

It is a necessary first step to enact a Race Relations Act for Fiji covering the actions of private individuals and prohibiting discrimination of all kinds, but particularly racial discrimination. The object of such a measure is the provision of a practical remedy for certain defined discriminatory acts and

practices, e.g. in public places, the supply of goods, the provision of facilities and services, employment, accommodation, trade unionism, and public utterance. Such an enactment must include four elements:[8]

(a) First, discriminatory practices must be declared unlawful,

(i) in all places to which the public has access;

(ii) in all public service vehicles or other means of public transport or conveyance;

(iii) by all persons supplying goods, facilities or services to the public or a section of it; or supplying them on less favourable terms or conditions than otherwise by reason of discriminatory practices;

(iv) in employment either by a person, company local authority or other bodies, public or private;[9]

(v) in the disposition of any estate or interest in land or any residential or commercial accommodation;[10]

(vi) in the membership or operation of any trade union or industrial union;

---

8 The measures proposed follow very closely the provisions of the United Kingdom Race Relations Act 1968 and the New Zealand Race Relations Act of 1971.

9 This question of employment should include all matters incidental to employment - such as employing, refusing to employ, or omitting to offer or affording any person the same terms of employment, conditions of work etc., dismissal and advertisements. However, such provisions should not be held discriminatory if the employment of a person of a particular ethnic or national origin requires or is commonly found to require a particular qualification or aptitude e.g. for a Fijian or Indian to be required to teach his vernacular language or culture.

10 This will include laying conditions, or strictures, or restrictive covenants on any such disposition or dealing in land. Disposition or dealing should cover sale, mortgage, assignment, lease, sublease, letting or subletting, licence etc.

(vii) in any advertisement pertaining to any of the above.

(b) Secondly, the above prohibitions of discriminatory practices must be subject to the exception where something is done or omitted to be done in good faith for the purpose of assisting or advancing particular persons or groups of persons of a particular race, colour, or ethnic or national origin, and such groups or persons need or may reasonably be supposed to need assistance or advancement in order to achieve an equal place with other members of the community, and nothing is done to degrade or deprive other groups.

(c) Thirdly, it is very important that there should be express prohibitions against persons, who with intent, or who are reasonably likely to intend to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in Fiji on the ground of tribe, creed, colour, race or ethnic or national origins, or publish abusive, threatening or insulting matter about such a group. This prohibition should be extended not only to publishing but also to dissemination by radio or otherwise. Also, it is submitted, it should be extended to the use in any public place or within the hearing of persons in any public place, or at any meeting to which the public or a section of the public have access, of any such words having the effect of exciting hostility. However, to avoid frivolous prosecutions and in the public interest, prosecutions of such offences should require the

consent of the Attorney-General of Fiji.

(d) Fourthly, there should not be automatic prosecution of offenders. There ought to be a prior reconciliation procedure. This approach of the measure to unlawful discrimination must be to place a primary and heavy emphasis of conciliation and mediation as a preliminary to any formal legal proceedings. This is a delicate field and litigation must be a last resort. The whole idea of the proposal is to educate and indoctrinate the peoples of Fiji in the multi-racial outlook and having all the races working and living together within a single social unit. Court proceedings in respect of relatively technical and minor breaches could exacerbate race relations and create avoidable animosities. Scope must be given to secure better understanding and the removal of grievances between persons of different races or origins. A conciliator to whom all infringements of the race relations legislation should be referred initially will be required. The appointment should be made by the Governor-General on the advice of the Chief Justice.

The principal functions of the conciliator would be -

(a) To investigate, either on complaint made to him by any person or of his own motion, any act or omission or any practice which may appear to be in breach of the proposed measure;

(b) To act as conciliator in relation to such act or omission or practice;

(c) To take such further action as is referred to above.

The conciliator should have a discretion to refuse investigation or take any other action where he feels the matter is trivial,

frivolous, or not made in good faith, or the complainant has not a sufficient interest in the subject matter of the complaint; or the aggrieved person does not desire any action or continuation of any action; or where under all the circumstances there are other adequate legal remedies available other than a right to make complaint to the Ombudsman or the right to petition Parliament.

The conciliator should function as a judicial body with the right to summon witnesses and the right to hear evidence. The parties should also have a right to representation by counsel.[11]

The conciliator should make an annual report on the work of his office to the Attorney-General and a copy of the report should also be laid before both Houses of Parliament. This would be a source of useful information and provide an opportunity for the Houses of Parliament to examine the operation of the legislation.

The conciliator is intended to use his best endeavours to secure a settlement between the parties concerned and possibly an assurance of non-repetition. This would obviate technical or minor breaches being dealt with in court proceedings. Should the matter be too grave for settlement by conciliation and when the public interest requires that it should not be so resolved, or settlement is not possible, the conciliator would make a report

---

11 It is not proposed to deal with all aspects of the proceedings and procedure before the conciliator as they are not important in the present context.

to the Constitutional Council and the Director of Public Prosecutions.

The Constitutional Council would then consider the report and might make one of two recommendations. First, it might recommend to the Attorney-General that civil proceedings[12] be brought by him and the Attorney-General would be bound by such a recommendation. It is just and proper that, as a matter of social justice, the State should intervene on behalf of a person discriminated against on racial or other discriminatory grounds, as defined, rather than place on him the burden and expense of bringing proceedings. Furthermore, if the action were brought in the name of the Attorney-General, it would certainly give the impression of a State-activated proceeding.

Secondly, the Constitutional Council might dismiss the complaint. In such an event, the aggrieved person might bring the action himself at his own expense. However, for the reasons already given, the Attorney-General should be cited as the original party. At least three weeks before the commencement of the proceedings, the Attorney-General should be informed. The Attorney-General would not be liable for costs, these being the responsibility of the aggrieved party.

It is intended that any infringement of the proposed race relations legislation would render the offender liable to criminal proceedings as in the case of the infringement of other statutory

---

12 As to "civil proceedings" see p. 566, post.

provisions. Such proceedings call for little comment.

But in addition to criminal proceedings there ought to be a right to bring civil proceedings. All civil proceedings should be brought in the name of the Attorney-General for the reasons given earlier. In such civil proceedings the remedies available to the court should be

(a) a declaration that a breach of the race relations measure has occurred;

(b) an injunction restraining the "offender" from continuing or repeating the breach, or from engaging in, or causing or permitting others to engage in conduct of the same kind as that constituting the breach or conduct of any similar kind specified in the injunction. Such a wide and all embracing power of injunction is required. In substance, the offender ought to be prevented, both personally and by other indirect means, from repeating the breach. It will be an ineffective process if the offender can secure the repetition of such actions, the subject of the proceedings, through other persons.

(c) Damages. Damages would be another positive means of penalising an offender. It is contended that the proposed race relations measure is essentially an extension of the fundamental rights provisions relating to prohibition of discrimination. It creates additional rights not available at common law. Ordinarily individuals do have recourse to a number of remedies against other individuals for invasion of their legal rights and breach of legal duties towards them.

These remedies include injunction and damages. There is no valid reason for not extending the same principle to breaches of the proposed legislation. Damages herein should be available in respect of

(i) pecuniary loss suffered and expenses reasonably incurred by the aggrieved party in the transaction or activity out of which the breach arose;

(ii) loss of any benefit which the aggrieved party may reasonably have been expected to obtain but for the breach; and

(iii) humiliation, loss of dignity, and injury to the feelings of the aggrieved person.

However, if criminal proceedings are instituted, all civil proceedings should be stayed until final determination of the former. The result of the criminal proceedings should in no other way affect the civil proceedings. Moreover, nothing said or done in the report of the conciliator should be admissible in evidence in any legal proceedings. Such matters must be absolutely privileged. Only then will the true intention of having the conciliation proceedings be achieved.

If a person has been convicted of any offence under the proposed legislation or made liable to pay damages in a civil proceeding, this should be made relevant to the grant, renewal, revocation, cancellation or review of any licence or registration in respect of the occupation or activity of the offender.

PART SIX

THE WORKING OF THE CONSTITUTION

Introduction

A study of the origins of modern constitutions will disclose that, as a general rule, they were framed and adopted by people making a fresh start in the form and system of their government. In some countries the desire arose as a result of revolution or war or of throwing off the yoke of foreign domination. In others, there was a desire to form a federation of sovereign states. In Fiji, the achieving of political freedom necessitated the drafting of a constitution. The preamble to the Fiji Constitution states:

> Whereas all the peoples of Fiji ... have become united under a common bond, have progressively advanced economically and politically and have broadened their rights and freedoms in accordance with the dignity of the human person and the position of the family in a society of free man and free institutions ....

These having been achieved, the people of Fiji, desired Fiji to become "a sovereign democratic state"[1] with its own written Constitution which is declared to be the fundamental law of the land.[2]

The 1970 Fiji Constitution contains legal rules and principles for the government of the Dominion. It is not only a solemn document but is also a living framework for the government of the people. All limbs of the government - legislative, executive and judicial - depend upon the Constitution which is the foundation for the institutions of government. However, a constitution, no matter how well and idealistically constructed, cannot function among a people who are at odds with one another. Experience in other countries, particularly the African countries which secured their independence in the Commonwealth era, has shown that the human element is of paramount importance in the success or failure of the working of a constitution. Professor Nwabueze has aptly observed:[3]

---

1 Preamble to the Constitution.

2 Constitution, s.1.

3 Constitutionalism in the Emergent States (1973), 139.

> Experience has amply demonstrated that the greatest danger to constitutional government in emergent states arises from the human factor in politics, from the capacity of politicians to distort and vitiate whatever governmental forms may be devised. Institutional forms are of course important, since they can guide for better or for worse the behaviour of the individuals who operate them. Yet, however carefully the institutional forms may have been constructed, in the final analysis, much more will turn upon the actual behaviour of these individuals - upon their willingness to observe the rules, upon a statesmanlike acceptance that the integrity of the whole governmental framework and the regularity of its procedures should transcend any personal aggrandisement. The successful working of any constitution depends upon what has aptly been called the "democratic spirit", that is, a spirit of fair play, of self restraint and of mutual accommodation of differing interests and opinions. There can be no constitutional government unless the wielders of power are prepared to observe the limits upon governmental powers.

The success or failure of the Fiji Constitution will also depend a great deal upon those who wield power under the constitutional framework. To cover all aspects of the working of the Constitution in Fiji would be out of place in this work. However, it is intended to choose three aspects of the working of the Constitution for discussion and, as far as possible, to relate those aspects to the functioning of the executive, the legislature and the judiciary. It is proposed to deal with the executive under the general topic of the place of English constitutional conventions, particularly with reference to the office and functions of the Governor-General, in the framework of the Fiji Constitution. The legislature will be discussed under the heading of the Second Chamber. Finally, the judiciary's role under the Constitution will be discussed in relation to the constitutional crisis which occurred in 1973, called the Speaker Crisis. The incident will be analysed and comment will be offered on the approach of the courts to the incident.

CHAPTER XVI

THE PLACE OF ENGLISH CONSTITUTIONAL CONVENTIONS IN FIJI

A. Introduction

In the United Kingdom, convention was and remains of great importance in constitutional law.[1] The conventions of the constitution have received much emphasis from all modern writers on British constitutional law.[2] In fact, substantially the whole of the constitutional framework in general and parliamentary government in particular is based on convention in English constitutional jurisprudence. As Dicey said, in speaking of the British constitutional rules, there are some rules which are laws in the strict sense, but there are another set of rules which[3]

> ... consist of conventions, understandings, habits or practices which, though they may regulate the conduct of the several members of the sovereign power, of the Ministry, or of other officials, are not in reality laws at all since they are not enforced by the courts. This portion of constitutional law may, for the sake of distinction, be termed the 'conventions of the constitution', or 'constitutional morality'.

In the United Kingdom, it has been rightly said:[4]

---

1 As a source of law, custom or convention is not confined to constitutional law, but in that branch of the law it plays a more prominent part and is governed by somewhat different rules from those which prevail elsewhere. For a general discussion of custom as a source of law, see Sir Carleton K. Allen, Law in the Making (7th ed., 1964), 67-160.

2 E.g., A.V. Dicey, Law of the Constitution (10th ed., reprint, 1960), 23-30 and 417 et seq.; Sir Ivor Jennings, The Law and the Constitution (4th ed., 1952), 79 et seq. For a comprehensive and critical analysis of the difference between laws and conventions, see C.R. Munro, "Laws and Conventions Distinguished" (1975) 91 L.Q.R. 218.

3 Dicey, op. cit., 24.

4 Sir Ivor Jennings, Cabinet Government (3rd ed., 1959), 1.

> 'the law' is not an emanation from authorities set up or provided for by a written and formal document. It consists of the legislation of parliament and the rules extracted from the decisions of judicial authorities. The powers of these bodies and relations between them are the product of history.

In the United Kingdom practically all the constitutional features relating to the framework of the government and the legislature, and the relationship between the Monarch and Parliament are based not upon the law in the strict sense but upon convention. Neither Cabinet nor the office of the Prime Minister was established by legislation; nor has either been recognised by the courts of law. Prior to 1937 Cabinet was not even mentioned in any Act of Parliament. In fact, even in 1937 the Ministers of the Crown Act did no more than provide higher salaries for those ministers who were members of the Cabinet. It was because of this fact that it became necessary to define which ministers were members of the Cabinet. Similarly, the same legislation also provided a salary for the Prime Minister and First Lord of the Treasury; hence these two "officers" had to be mentioned.[5] Yet well before 1937 the whole government in the United Kingdom had depended upon the Cabinet system with the Prime Minister presiding.

In the United Kingdom there are various matters of utmost significance in the executive and the legislative fields which do not depend upon express rules of strict enforceable law or legislation. They are governed by rules developed as conventions. Such rules include, and the list is not exhaustive:

(a) the appointment and choice of the Prime Minister and the Cabinet;
(b) the fact that the executive branch of government is parliamentary inasmuch as Ministers must be members of the legislature, where Ministers are collectively and individually responsible for government acts and omissions;
(c) the existence of the Monarch as the titular head of the State and the "rule" that no laws are enforced until assented to by the Monarch;

---

5 Ibid. 2. In fact, as pointed out by Sir Ivor Jennings, prior to this there had been only two incidental references to the Prime Minister: idem.

(d) the power of dissolution of Parliament vested in the Monarch and the "rules" relating to dissolution of Parliament;

(e) the position of the Opposition in Parliament;

(f) the relationship between the Monarch and the Cabinet which includes the "rules" that the advice of the Prime Minister must be accepted by the Monarch and that it is the duty of the Prime Minister to keep the latter informed as to the running of the Government.

Those rules which exist in the United Kingdom as conventions have been exported to other British Dominions. This has been done in three ways. First merely by adopting the framework of the Westminster model, the other conventional rules are introduced by implication. Most of the constitutional framework of the older Dominions falls into this category.[6] New Zealand affords a striking example of this type.[7] The New Zealand Constitution Act 1852 which is, as the name suggests, the basic enactment setting up the constitutional framework in New Zealand, makes no mention whatsoever of the position and/or duties of the Prime Minister or the cabinet or the relationship between the Governor-General and the cabinet or the Prime Minister. Yet the Dominion has been governed for one hundred and twenty years on the basis of a cabinet headed by the Prime Minister. Similarly, the Speaker presides over the House of Representatives. His status and method of election are based on English tradition and convention. Also in New Zealand it is accepted, as is the convention in the United Kingdom, that the Crown and the Governor-General must in normal circumstances accept the advice of the ministers.[8]

---

6 S.A. de Smith, The New Commonwealth and Its Constitutions (1964), 78.

7 The first Cabinet was introduced in 1856; K.J. Scott, The New Zealand Constitution (1962), 79.

8 Scott, op. cit., 71. The Royal Instructions of 1917 state in clause V:

> In the execution of the powers and authorities vested in him, the Governor-General shall be guided by the advice of the Executive Council ....

The second manner of introducing conventional rules into other countries is by reference, as opposed to implication. The constitutional enactments of these countries make provision for the rules pertaining to their constitutional practice to be similar to those practices applicable in like matters in the United Kingdom. For instance, the 1946 Constitution of Ceylon included specific provisions about matters such as the cabinet government, but the conventions regulating the powers vested in the Governor-General were not spelt out. Instead it was provided in section 4 that:[9]

> All powers, authorities and functions vested in His Majesty or the Governor-General shall, subject to the provisions of this Order [and other laws] be exercised as far as may be in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty ....

The third manner in which the conventions of the British constitution were introduced in the newly independent British Dominions was by spelling out in some detail those matters which have traditionally been left to convention and usage in the United Kingdom. Attempts to state specific conventions as rules of law are to be found in the constitutions of most of the countries which achieved independence in the Commonwealth era[10] as opposed to the Empire era - although many of these countries later adopted a republican constitution.[11] This method has been used to give a reasonably full statement of the major rules governing the executive branch and its relationship with the legislature.

B. The Position in Fiji

(1) General:

Fiji has followed the trend of the countries which secured their

---

9 Cited in Sir Ivor Jennings and H.W. Tambiah, The Dominion of Ceylon: The Development of its Laws and Constitution (1952), 68.

10 E.g., Nigeria, Sierra Leone and Jamaica. The first attempt seems to have been in the Irish Free State.

11 E.g., Nigeria and Kenya.

independence in the Commonwealth era in that the Fiji Constitution has spelt out in some detail those matters which have traditionally been left to convention and usage in the United Kingdom. Thus the Queen is an essential part of the legislature in Fiji[12] and the executive power is vested in Her Majesty by express provision of the Constitution.[13] Such executive power may be exercised on behalf of the Queen by the Governor-General in accordance with the provisions of the Constitution.[14] The power to summon, prorogue and dissolve Parliament[15] and the power to assent to Bills is also vested in the Governor-General.[16] Similarly, there are specific constitutional provisions relating to practically all other matters governed by conventions in the United Kingdom, namely:

(a) the appointment and dismissal of the Prime Minister, other ministers and the cabinet; the function of the cabinet to advise the Governor-General and the collective responsibility of the cabinet; and the functions and responsibility of ministers;[17]
(b) the election of the Speaker of the House of Representatives and the President of the Senate;[18]
(c) the responsibility of the Prime Minister to keep the Governor-General informed concerning the general conduct of the government of Fiji;[19]
(d) the appointment and dismissal of the Leader of the Opposition;[20]

---

12 Constitution, s.30.

13 Ibid., s.72(1).

14 Ibid., s.72(2).

15 Ibid., s.69.

16 Ibid., s.53 (4).

17 Ibid., ss.73-80.

18 Ibid., ss.50 and 57.

19 Ibid., s.79.

20 Ibid., s.86.

(e) the exercise of the prerogative of mercy;[21]

(f) restrictions with respect to money bills;[22]

(g) the dominance of the will of the Lower House (except in relation to matters falling within sections 67 and 68 of the Constitution).[23]

There are certain advantages in having these major English constitutional conventions incorporated in specific constitutional enactments.[24] First, it reduces the area of uncertainty about the conventions particularly where there have been few, if any, precedents. A classic example is the question which arose in relation to the dismissal of the Premier of the Western Region of Nigeria in 1962. This culminated in a court proceeding in Adegbenro v Akintola.[25] By section 33 of the Constitution of Western Nigeria, the Governor could remove the Premier if "it appear(ed) to him that the Premier no longer command(ed) the support of a majority of the members of the House of Assembly". The Governor of the Western Region of Nigeria, following the receipt of a letter signed by sixty-six members of the House of Assembly - which was composed of one hundred and twenty-four members - stating that they no longer supported the Premier, removed him from office and appointed another Premier. There had been no vote adverse to the "deposed" Premier in the House prior to his removal. The deposed Premier argued that as the phrase "the Premier no longer commands the support of a majority of the members" was derived from the "conventions" of the unwritten constitution of the United Kingdom, there was an assumption that the Governor could not constitutionally take account of anything in the way of "support" except the record of votes actually given on the floor of the House of Assembly. However, it was held by the Privy Council that there was nothing in the Constitution which legally precluded the Governor from forming his opinions otherwise than on the basis of votes formally given on the floor of the House.

---

21 Ibid., s.88.

22 Ibid., ss.62-64.

23 Ibid., s.64.

24 For a comprehensive analysis of the advantages relating to such provisions in New Zealand see J.F. Northey, The Governor-General of New Zealand, (1950) Doctoral Thesis, University of Toronto, 20-28 and 319-335.

25 [1963] A.C. 614.

By the use of the words "it appears to him" in section 33, the judgment as to the support enjoyed by a Premier was left to the Governor's own assessment and there was no limitation as to the material on which he was to base his judgment or the contacts to which he might resort for the purpose. Viscount Radcliffe pertinently pointed out:[26]

> "It is true that the Western Nigerian Constitution ... does embody much of the constitutional practice and principle of the United Kingdom .... But, accepting that, it must be remembered that, as Lord Bryce once said, the British Constitution 'works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overriden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution."

However, Viscount Radcliffe made this significant observation:[27]

> The first is that British constitutional history does not offer any but a general negative guide as to the circumstances in which a Sovereign can dismiss a Prime Minister. Since the principles which are accepted today began to take shape with the passing of the Reform Bill of 1832 no British Sovereign has in fact dismissed or removed a Prime Minister .... In this state of affairs it is vain to look to British precedent for guidance upon the circumstances in which or the evidential material upon which a Prime Minister can be dismissed, where dismissal is an actual possibility: and the right of removal which is explicitly recognised in the Nigerian Constitutions <u>must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import</u>.

Accordingly, it is apparent that if the matters pertaining to the powers of the Governor to remove the Premier had not been expressly incorporated in the Constitution, various areas of uncertainty would have been involved, particularly when the English position under the convention was not clear.

---

26 Ibid., 631.

27 Idem. (Emphasis added).

A second advantage arising from the first, is that there is no generally recognised or binding rule as to conventions to govern each situation of crises. Professor J.F. Northey, with respect, rightly pointed out:[28]

> [T]he conventions in accordance with which [Her] Majesty exercises [her] functions are by no means clear or immutable. The manner in which [Her] Majesty shall act depends upon the interpretation of a body of precedents which are continually being added to; the older conventions are thereby modified, and it is difficult at any given time to state with certainty the action which [Her] Majesty would take in a given situation.

Moreover, certain conventions of the English practice may be relevant and applicable in the United Kingdom because of its historical development and traditions. But in other countries which have "imported" the Westminster model, there is uncertainty as to what modifications have to be made in the application of the conventions in the local context and circumstances. Professor Northey has, with respect, aptly observed,[29]

> [I]t is both possible and perhaps essential for many of the conventions ... to be reduced to rules, so as to exclude the possibility of controversies as to their scope and application, and for many powers, which, because of the accidents of history, have remained vested in the Governor-General, to be transferred to the responsible Ministers.

There is "uncertainty not only as to what rules should be applied but also as to how in any particular case they should be applied".[30] This is particularly so in regard to the residuary discretions which call for exercise in situations arising out of political crisis. Such a situation could place the representative of the Queen (Governor-General in Fiji) in a very awkward position. However, if the conventions are spelt out in detail, then the position of the Governor-General is relatively easier and less open to criticism than it might otherwise be. As Dr Evatt has observed,[31]

---

28 Northey, op. cit., 20 (emphasis added).

29 Ibid., 319.

30 H.V. Evatt, The King and His Dominion Governors (2nd. ed., 1967), 304.

31 Ibid.

> Perhaps the greatest advantage to be derived from defining the extent of the discretion as to the exercise of reserve powers is that the absence of definition may prevent an over-careful Governor-General from acting when he should, just as it may enable an imprudent or over-zealous Governor-General to act where no reasonable ground for intervention exists. In each case an error may be fatal to the best interests of the people, which are committed in the last resort to the care of the Governor-General or Governor.

Thirdly, in the United Kingdom and those countries which have imported the Westminster model without express provisions as to the conventions, no independent tribunal is vested with authority to determine either what the general rule is, or how it should be applied to the particular case. In Fiji, on the other hand, at least some of the conventions which have been expressly spelt out in the Constitution are justiciable although, as will be seen later, most of the functions pertaining to the Governor-General are not.[32] For instance, the right of the Governor-General to remove the Prime Minister is, as will be seen, prima facie a justiciable matter in Fiji although in the United Kingdom it is merely a matter of convention.[33] In Fiji it has been said[34] that the Supreme Court has been given express jurisdiction to grant relief to any person who "alleges that any provision of this Constitution ... has been contravened and that his interests are being or are likely to be affected by such contravention".[35]

The Fiji Constitution seems to contain most of what is conventional in the United Kingdom. Because there are significant residuary discretionary powers vested in the Governor-General, it is imperative that the constitutional functions of the Governor-General and matters allied to such functions be separately treated.

---

32 See p.602, post.

33 Adegbenro v Akintola [1963] AC 614.

34 See p.183 et seq., ante.

35 Constitution, s.97.

(2) The Constitutional Functions of the Governor-General in Fiji

(a) Appointments:

In those Commonwealth countries where the head of state is a President or an indigenous traditional ruler, there are invariably specific provisions in the Constitution as to how he is to be selected and there are reasonably clear provisions[36] as to his role in the governmental process. For instance, in India the President is elected by an electoral college consisting of the elected members of the two Houses of the Union Parliament and of the State legislative assemblies; in Malaysia the Yang di-Pertuan Agong is a Malay ruler elected for five years by the Conference of Rulers, special weight being given to personal seniority.

However, there are no express provisions in the Fiji Constitution as to how a Governor-General is to be selected. All that the Constitution says is that the Governor-General is to be appointed by Her Majesty the Queen and that he shall hold office during Her Majesty's pleasure and he shall be Her Majesty's representative in Fiji.[37] There is no further guidance as to how such an appointment is to be made.

In early colonial days colonial ministers were not consulted as to the person appointed by the United Kingdom Government as the Governor of the colony concerned.[38]

The matter of the appointment of Governors-General for the Dominions was discussed at the Imperial Conference of 1930. Previously it had been declared by the Report of the Inter-Imperial Relations Committee of the Imperial Conference of 1926 that the Governor-General of a Dominion was[39]

---

36 Except perhaps in India.

37 Constitution, s.27.

38 For a comprehensive history and the position of colonial governors and Governors-General prior to 1930 and the appointments of Governors-General generally, see Northey, op. cit., 57-67.

39 Cmd. 2768 (1926), 16.

> the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

The Report did not, however, contain any declaration as to the procedure to be adopted thenceforward in the appointment of a Governor-General. Hence the Imperial Conference of 1930 felt it necessary to consider this aspect. After due consideratin the following conventions were agreed to:[40]

1. The parties interested in the appointment of a Governor-General of a Dominion are the Monarch, whose representative he is and the Dominion concerned.

2. The constitutional practice that the Monarch acts on the advice of responsible Ministers applies also in the appointment of a Governor-General.

3. The Ministers who tender and are responsible for such advice are the Ministers in the Dominion concerned.

4. The Ministers concerned tender their formal advice after informal consultations with the Monarch.

5. The channel of communication between the Monarch and the Government of any Dominion is a matter solely concerning the Monarch and such Government.

6. The manner in which the instrument containing the Governor-General's appointment should reflect the above principles is a matter in regard to which the Monarch is advised by the Ministers in the Dominion concerned.

Accordingly, it is clear that the two Conferences asserted the general principles that the Monarch acts upon the advice of responsible Ministers and this included the appointment of the Governor-General which is a Dominion affair. It is submitted that since there are no express provisions in the Constitution of Fiji as to how the Queen is to select the Governor-General it was tacitly understood that the conventions agreed

---

40 Cmd. 3717 (1930), 27.

to by the 1930 Imperial Conference were to apply.[41] Hence the selection of the Governor-General in Fiji will depend upon the views of the government at the time.

Although the appointment of a Governor-General may admit of an easy answer by accepting that the conventions adopted at the 1930 Conference apply, what will be the position as to termination of his appointment? It is submitted that the logical inference from the 1926 Report and the Conventions agreed on at the Imperial Conference in 1930, that the appointment of a Governor-General is exclusively a matter for the Dominion concerned, is that the termination of such an appointment is likewise a matter exclusively for the Dominion concerned.[42] Hence, as Mr Justice Evatt (as he then was) observed:[43]

> It would seem, therefore, that Dominion Ministers must possess sufficient 'constitutional' authority to approach His Majesty directly ... for the purpose of advising the King that the appointment of the Governor-General should be terminated.

This, it is submitted, is the correct view. Otherwise, an anomalous situation would arise whereby the appointment of a Governor-General was the concern of the Dominion but the termination was not. It is submitted that a power to appoint upon recommendation must, unless it is expressly or by necessary implication excluded, include a power to terminate the appointment on like recommendation. This view is fortified by the Interpretation Ordinance of Fiji.[44] Section 45 of that Ordinance provides;

> Where by or under any written law a power or duty is conferred or imposed upon any person or authority to make an appointment ... then, unless a contrary intention appears, the person or authority having such power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment ....

---

41 S.A. de Smith, op. cit., 92.

42 Evatt, op. cit., 197.

43 Idem.

44 No. 11 of 1967.

Provided that where the power or duty of such person or authority so to act is exercisable only upon the recommendation, or is subject to the approval or consent, of some other person or authority, then such power shall, unless a contrary intention appears, be exercisable only upon such recommendation or subject to such approval or consent.

However, the possibility of the dismissal of a Governor-General on the advice of the responsible Ministers is not without its difficulties. If a Governor-General has been appointed by the Queen on the advice of responsible Ministers representing one political party and an election puts the government into the hands of the opposing political party, problems could arise. A dispute might arise between the Governor-General and his responsible Ministers. In such circumstances, the new Ministers would probably ask for the appointment of another Governor-General more in sympathy with the policies of the new government.[45] Such a practice may be repeated by the other political party when it returns to power. The appointment of the Governor-General would then become a political football.

In Fiji, some of the Governor-General's reserve powers are defined by the Constitution and will be capable of immediate enforcement, and in some cases, have been covered by authoritative declaration. But as will be seen, the Governor-General has important discretionary powers and a few very vital reserve powers which though defined, are non-justiciable. Accordingly, it is submitted, this power to terminate the appointment of the Governor-General has special significance.

(b) Exercise of Functions

(i) General

In Fiji, the functions of the Governor-General have been included in the Constitution. Most of these matters which have been described

---

45 E.g., in 1932 Mr De Valera, the Prime Minister of the Irish Free State, removed the then Governor-General from office in order to secure the passage of certain Bills, Northey, op. cit., 25-26.

as "reserve powers" of the Crown,[46] for example, the dissolution of Parliament have been defined in the Fiji Constitution. Dicey asserted that such questions as to whether the Ministry is entitled to recommend the dissolution of Parliament belongs to the realm of political understandings or conventions rather than to that of legal rules. According to Dicey[47] those conventions raised great and weighty issues, but "they are not inquiries which will ever be debated in the law courts"; they raised matters "too high for me", a "mere legist". Be that as it may, the Constitution in Fiji does specify the powers of the Governor-General in relation to these questions.

The functions of the Governor-General in Fiji fall into two classes. The first includes those where the Governor-General is expressly required to act on advice; and the second is where he is empowered to act in his discretion or, as the provisions state,[48] "in his own deliberate judgment". Generally, in the exercise of his functions under the Constitution or any other law, the Governor-General has to act in accordance with the advice of the cabinet or of a Minister acting under the general authority of the cabinet. In other cases he is required by the Constitution to act in accordance with the advice of, or after consultations with, any person or authority other than the cabinet or in his own deliberate judgment.[49] The most important functions which the Governor-General is to exercise on advice are:

(a) The appointment of the Constituency Boundaries Commission[50] and the Electoral Commission.[51]

(b) The appointment of the members of the Senate.[52]

---

46 For an exposition of the meaning and problems pertaining to the reserve powers of the Crown, see Evatt, op. cit., 252 et seq.

47 Dicey, op. cit., 20-21.

48 See p.592, post.

49 Constitution, s.78(1).

50 Ibid., s.38.

51 Ibid., s.39.

52 Ibid., s.45.

(c) The prorogation and dissolution of Parliament[53] except

(i) Where the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either resign from office or advise the Governor-General to dissolve Parliament within seven days or at such later time as the Governor-General considers reasonable; or

(ii) If the office of the Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives.

In both these exceptional cases just mentioned the Governor-General, acting in his own deliberate judgment, may dissolve Parliament.

(d) The appointment of Ministers[54] (other than the Prime Minister).

(e) The assignment of responsibilities to Ministers.[55]

(f) The assignment to perform the functions of Prime Minister during the latter's illness or absence.[56]

(g) The appointment of the Chief Justice and other puisne judges[57] and the Justices of Appeal.[58]

(h) The appointment of the members of the Judicial and Legal Services Commission.[59]

(i) The appointment of principal representatives of Fiji abroad.[60]

(j) The appointment of the Ombudsman.[61]

On the other hand, the most important functions which the Governor-General may exercise in his own deliberate judgment are:

---

53 Ibid., s.70.

54 Ibid., s.73.

55 Ibid., s.76.

56 Ibid., s.77.

57 Ibid., s.90.

58 Ibid., s.94(2).

59 Ibid., s.101.

60 Ibid., s.103.

61 Ibid., s.112.

(a) The appointment and removal of the Prime Minister.[62]

(b) Summoning of Parliament.[63]

(c) Dissolution of Parliament in two specified cases, namely, as has been seen, where a motion of no confidence has been passed by the House of Representatives and the Prime Minister does not resign within three days; secondly if the office of the Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able to appoint to that office a person who can command the support of a majority of the members of the House of Representatives.[64]

(d) The appointments of the Leader of the Opposition,[65] the Commission on the Prerogative of Mercy,[66] the Public Service Commission[67] and Police Service Commission.[68]

(e) The granting or withholding of Royal Assent.[69]

Although the two classes seem to be different, for practical purposes the distinction is without much significance. Where the Governor-General is required by the Constitution to exercise any function after consultation with any person or authority other than the Cabinet, he is not obliged to exercise that function in accordance with the advice of that person or authority.[70] Also, the question whether he has in any matter so acted shall not be called in question in any court of law.[71] Hence the Governor-General, for practical purposes, can do what he likes whether the exercise of power falls

---

62 Ibid., s.73(2).

63 Ibid., s.69.

64 Ibid., s.70(1)(a) and (b); see p.588, post.

65 Ibid., s.86.

66 Ibid., s.88.

67 Ibid., s.104.

68 Ibid., s.106.

69 Ibid., s.53(4).

70 Ibid., s.78(2).

71 Ibid., s.78(3).

under the first or the second class referred to above. Of course, whether the Governor-General will do that is another matter.

Of the powers of the Governor-General in Fiji, three call for special comment. They are the appointment (and termination of appointment) of the Prime Minister, the dissolution of Parliament and the power to assent or withhold assent to Bills.

(ii) The Appointment and Removal of the Prime Minister:

In the United Kingdom, the question of the appointment and removal of a Prime Minister is governed by conventional rules.[72] The Monarch exercises her prerogative in choosing the Prime Minister. However, the practice is (and reasonably so) that the person chosen must be one who is capable of forming a government acceptable to the House of Commons, and hence acceptable to the dominant party or combination of parties in that House. According to Sir Ivor Jennings,[73] it is a settled rule that the Prime Minister must be either a peer or a member of the House of Commons. Between 1837 and 1902, no less than six of the Prime Ministers were peers. However objections were raised to a peer being Prime Minister.[74] The fact that since the resignation of Lord Salisbury in 1902 no British Prime Minister held a peerage had led Professor Mitchell to think that it has now become accepted that the Prime Minister must be a member of the House of Commons.[75] This is

---

72 For a fuller account of the rules governing the appointment of Prime Minister in the United Kingdom, see Cabinet Government, op. cit., 20 et seq. and J.D.B. Mitchell, Constitutional Law (2nd ed., 1968), 177 and 194. It is acknowledged that much assistance has been derived from Cabinet Government. As to the position in the Commonwealth, generally, see J.F. Northey, "The Prerogative Power of Dissolution", (1951) 27 N.Z.L.J. 204; and J.F. Northey, op. cit., 177 et seq.

73 Jennings, op. cit., 21.

74 For a summary account of such objections see ibid., 22 et seq.

75 Mitchell, op. cit., 194.

why Sir Alec Douglas-Home had to renounce his peerage to become the Prime Minister. His renunciation of the peerage was both a constitutional and a political necessity.

In Fiji, the choice of a Prime Minister remains the prerogative of the Governor-General within the rules contained in the Constitution. The Governor-General appoints as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the members of that House.[76] It is quite clear that the Prime Minister must be a member of the House of Representatives - but other Ministers need not be.[77] In arriving at his decision, the Governor-General acts on "his own deliberate judgement". The Constitution does not prescribe how the Governor-General makes his choice but English practice would be of some assistance.

In the United Kingdom there is little guidance as to how the Queen exercises her prerogative of choosing a Prime Minister. The Queen's choice necessarily depends upon the state of the parties in the House of Commons. In normal circumstances where a party has a clear majority, the Government must be formed from that majority. If the party has a recognised leader, he will invariably be chosen as the Prime Minister. Otherwise embarrassing situations could arise. For instance, such a situation could have arisen after the general election of 1880. Mr Gladstone had resigned as leader of the Liberal Party in 1874. Lord Granville led the Liberals in the House of Lords and Lord Hartington was their leader in the Commons. However, Mr Gladstone had led the opposition to the Government in the country and the election was regarded as a personal contest between Mr Gladstone and Lord Beaconsfield. The Queen sent for Lord Hartington but he and Lord Granville had already agreed that Mr Gladstone must be Prime Minister. The former had recognised that no Government could be formed without Mr Gladstone's support and the latter would not accept subordinate office. Hence the Queen had no option but to ask Mr Gladstone to form the Government.[78]

---

76 Constitution, s.73(2).

77 Ibid., s.74.

78 Jennings, op. cit., 25.

Normally a party which succeeds in obtaining a majority at an election will have a recognised leader. The Sovereign has an effective choice where the recognised leader dies, or for certain other reasons is no longer capable of fulfilling his duties[79] and there is no recognised deputy leader to succeed him. For instance in 1923 when Mr Bonar Law resigned as Prime Minister King George V was left with a choice between Lord Curzon and Mr Baldwin - he chose Mr Baldwin.[80]

Similarly, it does not necessarily follow that when a person is appointed as Deputy Prime Minister, he is the obvious person to be the next Prime Minister should occasion arise for such an appointment.[81] Neither does the Leader of the House of Commons necessarily have such a claim.[82]

However, if there is no party in Parliament with an absolute majority, the Queen has an unfettered discretion as to the leader she will invite to form the government. The first general election result in the United Kingdom in 1974 provides a classic example. The general election held on 28 February was one of the most inconclusive in British political history, with no party obtaining an overall majority in the new House of Commons. The Labour Party (headed by Mr Harold Wilson), with three hundred and one seats, emerged as the largest party in the Commons. The Conservative (headed by Mr Edward Heath) was a close second with two hundred and ninety-six seats. The total number of seats were six hundred and thirty-five. Thus neither had an overall majority. Hence the situation created was one of political deadlock, with no party having an overall majority.

---

79 For instance the position of Mr Stonehouse if he was a party leader.

80 As to a comprehensive treatment of this subject of choice of a Prime Minister in the United Kingdom see Jennings, op. cit., Ch. II.

81 E.g., Mr Hugh Watt was Deputy Prime Minister in New Zealand in 1974 but he did not become Prime Minister after Mr Norman Kirk's death.

82 Jennings, op. cit., 27.

In such a situation the Queen has three alternatives. The first possibility is the formation of a coalition government and in fact after the February General Elections Mr Heath unsuccessfully tried to form a coalition with the Liberals.[83] Coalition governments have been formed in the past.[84] Secondly, one party may be invited to form a minority government with the intention of advising a dissolution as soon as practicable. Thus after the first elections in February, 1974 Mr Wilson formed a minority government which held office between 4 March 1974 and 30 September 1974 when it was dissolved.[85] A third option is the formation of a minority government which is able to maintain itself in office in spite of its lack of a majority.[86]

It is submitted that in Fiji the position is relatively simple as far as the appointment and "dismissal" of the Prime Minister is concerned. If a Party does not secure an overall majority and there is no likelihood of a coalition Government, there will be no one who can be appointed as Prime Minister. [Section 73(2) of the Constitution makes it clear that the Governor-General must appoint as Prime Minister the member of the House of Representatives who appears "best able to command the support of the majority of all members of that House".] If there is no one able to do this the Governor-General will, it is submitted, be able to dissolve Parliament by virtue of section 70(1)(b) of the Constitution, the office of Prime Minister being vacant.[87] That provision reflects British practice. It is significant to note in relation to the appointment of the Prime Minister that there is no

---

83 Keesing's Contemporary Achieves, (March 11-17, 1974), 26397.

84 See Jennings, op. cit., 29 fr examples of coalition governments.

85 Keesing's Contemporary Archives, (Sept. 30 - Oct. 6, 1974), 26737.

86 Jennings, op. cit., 30.

87 S.70(1)(b) provides:

> If the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament.

reference to him being the leader of the majority party whereas the Leader of the Opposition is referred to as the leader in the House of the opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party; or if there is no such party, the member of the House whose appointment would, in the judgment of the Governor-General, be most acceptable to the leaders in the House of the opposition parties.[88] Nonetheless, for practical purposes, the Governor-General must take into account whether the proposed Prime Minister is the leader of the majority party because he will have to assess whether the person concerned will have the support of the members of the majority party in the House of Representatives.

Since the English constitutional conventions apply in Fiji not as conventions but by virtue of specific constitutional provisions, it is submitted that there should have been a clearer provision regarding the appointment of Prime Minister. This should not have been left entirely in the hands of the Governor-General to act according to "his own deliberate judgment". There is no legitimate reason for such wide powers being conferred on one person. If a parliamentary party has an overall majority, that party must have some say, even in an advisory capacity, as to who should lead the government. The parliamentary party should be given an opportunity to select its leader and advise the Governor-General of its choice. Only then should the Governor-General appoint as the Prime Minister the person chosen by the popularly elected members. Thus it will be the people acting through their elected representatives who will and should decide such an important issue. The writer endorses, what was said by the Opposition (Labour) Shadow Cabinet in 1957 when Mr MacMillan was commissioned by the Queen;[89]

> The Parliamentary Committee ... considers that, if at any time a Labour Prime Minister resigns or dies while in office and while the Government retains its majority in the House of Commons, the appropriate course to follow would be for the Parliamentary Labour party first to proceed to the election of a new leader who would

---

88 Constitution, s.86(2).

89 Cited in Evatt, op. cit., xxviii.

then be ready to accept the invitation of the Crown to become Prime Minister.

This statement was made because Mr MacMillan had been commissioned without there being an election by the parliamentary party; the Queen had nonetheless acted on the advice of Conservative leaders. On the retirement of Mr MacMillan in 1963 Sir Alec Douglas-Home was commissioned by a similar procedure. There was widespread criticism of the Conservative Party processes which it was said should confirm to Labour practice.[90]

It is submitted that the choice of Prime Minister in a popularly elected legislature should not be the direct concern of the Monarch or the Governor-General. The real choice should be left with the elected representatives. But if a situation arises where no party has an overall majority, it is conceded that the choice of Prime Minister ought then to be left with the Governor-General. Needless to say, in such a case the elected representatives will find it difficult, if notimpossible, to come to a decision - unless of course two or more parties agree to a coalition. If a coalition is formed, the Governor-General would of course be advised of it. However, in normal circumstances the elected representatives should make the choice and the Fiji Constitution should so provide.

This is particularly important when, as in Fiji at present, the Governor-General is a local person[91] who before his appointment had been actively engaged in politics.[92] Naturally enough he will have his personal views and prejudices regarding certain individuals; a very embarrassing situation would arise if he appointed as Prime Minister a person, albeit from the majority party, who did not have the support

---

90 Idem.

91 Ratu Sir George Kadavulevu Cakobau, G.C.M.G. K.C.V.O.

92 He had been a member of the Legislative Council in the pre-independence days, and had been a member of the Alliance Party (the current government party); and was the Minister For Fijian Affairs and Local Government at the time of his appointment as Governor-General in 1973.

of the majority of individual members and of the party. Even though the Governor-General may have acted without ulterior motives, such a choice would be regarded with suspicion, to say the least. Hence it would be advisable to forestall such an occurrence and include in the Constitution, as has been done with other conventional rules, express provision for the appointment of a Prime Minister. Adegbenro v Akintola[93] provides a classic example of how embarrassing situations can arise where the conventional rules are not clearly incorporated into positive law. Uncertainty and vagueness in the definitions of the constitutional powers of the Crown may lead to inconsistent action and may unavoidably involve the Crown and its representatives in unfortunate political controversy.

(iii) The Dissolution of Parliament:

General:

Under the English "Constitution", the dissolution of Parliament is governed partly by statute and partly by convention. By the Septennial Act, 1715, as amended by section 7 of the Parliament Act, 1911, a Parliament "shall and may ... have continuance for five years and no longer ... unless ... such Parliament ... shall be sooner dissolved by His Majesty, his heirs or successors".[94] There is a prerogative power to dissolve Parliament before the completion of the five year period, and in practice the Queen dissolves Parliament on advice before that period elapses. In the exercise of this prerogative of dissolution before the normal five year period has elapsed, three basic questions have been raised.[95] The first is whether the Queen can dissolve Parliament without advice. The second relates to the advice upon which the prerogative is to be exercised. The third is whether the Queen is bound to accept the advice tendered.

The first question is whether the Queen can dissolve Parliament without advice. Dissolution of Parliament in the United Kingdom

---

93 [1963] A.C. 614.

94 However, the Parliament elected in 1910 and 1935 were prolonged to 1918 and 1945 respectively because of world wars.

95 Jennings, op. cit., 412.

requires the acquiescence of ministers. It necessitates an Order in Council and the Lord President must summon the Council; it also necessitates a Proclamation and Writs of Summons under the Great Seal, for which the Lord Chancellor has responsibility. Accordingly, it is clear that the Queen connot secure a dissolution without advice. If the Minister refuse to advise a dissolution, the Queen can dismiss them and appoint others who will tender such advice[96] but no Monarch would take such a step lightly. Lord Salisbury aptly observed;[97]

> A dissolution by the Queen, against the advice of her ministers, would, of course involve their resignation. Their party could hardly help going to the country as the opponents of the royal authrity; or, at least, as the severe critics of the mode in which it had been exerted .... There must be some hazard that, in the end, such a step would injure the authority of the Queen. It ought not, therefore, to be taken unless there is an urgent reason for taking it.

The second question is upon whose advice should the prerogative of the Crown be based. At one time it was felt that the advice to dissolve Parliament should be submitted by the Prime Minister as the decision of the Cabinet. Lord Oxford and Mr Asquith laid down the rule that[98] "Such a question as the dissolution of Parliament is always submitted to the Cabinet for ultimate decision". Sir Ivor Jennings points out that so far as can be ascertained, every decision to dissolve, from 1841 to 1910 inclusive, was taken by Cabinet.[99]

However, in 1916 the question arose whether it was not the Prime Minister alone who could advise a dissolution. When Mr Asquith resigned, King George V sent for Mr Bonar Law. As the state of the majorities existed in the House of Commons, the King anticipated that

---

96 Ibid., 413.

97 Letters of Queen Victoria, 3rd series, Vol. 11 297-299, cited in Jennings, op. cit., 413.

98 Oxford and Asquith, Fifty Years of Parliament, Vol. II, 195, cited in Jennings, op. cit., 417.

99 Jennings, op. cit., 417.

Mr Bonar Law might insist that a dissolution be granted if he were to accept office. The King consulted Lord Haldane who advised that "the only Minister who can properly give advice as to a dissolution of Parliament is the Prime Minister".[1] It is surprising that such advice should have been given when history and precedents show clearly that except for a doubtful occasion in 1868,[2] all dissolutions prior to 1910 had been advised by the Cabinet.[3]

Nevertheless, Mr Bonar Law seems to have taken the same view as Lord Haldane. On the question being raised in the House of Commons Mr Bonar Law stated categorically:[4]

> Nothing is more clearly recognised by our constitutional practice than that these things are the subjects, not of any written rule, but they are governed by custom, and in my belief there is no custom more clearly defined than that what advice on this matter should be given to the Sovereign is a question not for the Cabinet but for the Prime Minister.

In fact Mr Lloyd George assumed the right to give advice, and since then all Prime Ministers have done so.[5]

The third question, which is related to the second, is whether the Queen is bound to accept the advice so tendered. In theory, she has the right to reject it but for more than a hundred years there has

---

1 Nicholson, King George V 289, cited in Jennings, op. cit., 418.

2 In 1868 Mr Disraeli asked for a dissolution without calling the Cabinet. However, the Cabinet had given a general assent some ten days before to a policy of dissolution, and Mr Disraeli probably did not want the Cabinet to change its mind and hence presented them with a fait accompli. Nonetheless, on the following day they endorsed his action albeit reluctantly; Jennings, op. cit., 418.

3 Ibid., 417 et seq.

4 110 H.C. Deb. 55, 2425.

5 Jennings, op. cit., 419.

not been a clear case in which the Sovereign has rejected advice to dissolve.[6] The English position, it is submitted, has been aptly put by Lord Esher thus;[7]

> According to my reading of constitutional usage the King can only accept, upon such a question as an appeal to the people, the advice of a Minister.
>
> Of course His Majesty could dispense with the advice of Ramsay MacDonald, but only if he could find in Baldwin or Asquith another Prime Minister to take the responsibility.
>
> And even then, under present circumstances, with parties balanced as they are in the existing Parliament, and in view of the real issues such as the Russian treaty, I think it would have been unwise to reject Ramsay's advice.

The position of the Crown in the exercise of its prerogative in the Dominions has presented a different picture. Here too a distinction must be drawn between the Dominions which secured their independence in the Empire era[8] and those which secured their independence during the Commonwealth era. As regards the latter, matters seem to have been simplified to a great extent, though some problems remain, by the inclusion of specific provisions governing the powers and rights of the Governor-General in relation to the dissolution of Parliament.[9]

Precedents of grant and refusal of dissolution in the Dominions of the Empire era show that the exercise of the prerogative of the Crown there differed from the position in the United Kingdom. First, the Governors-General (or the Governors, as the case may be) had on various

---

6 Ibid., 420-428 for the history and precedents.

7 Esher Papers, Vol. IV 296, cited in Jennings, op. cit., 426.

8 For the position in Australia and New Zealand, see J.F. Northey, "The Dissolution of the Parliaments of Australia and New Zealand", (1951-1952) 9 U.T.L.J. 294; and J.F. Northey, The Prerogative Powers of Dissolution" (1951) 27 N.Z.L.J. 204. As to the Dominions generally see E.A. Forsey, The Royal Powers of Dissolution of Parliament in the British Commonwealth (1943) and H.V. Evatt, The King and His Dominion Governors (2nd. ed., 1967).

9 The position in the Dominions of the Commonwealth era is dealt with sufficiently at p.599, et seq., post.

occasions refused to grant a dissolution when so advised by the Prime Minister (or the Premier of a State or Province as the case may be). For instance in Australia, three requests for dissolution were refused by the Governor-General in the five years between 1904 and 1909.[10] Similarly well known is the refusal of dissolution by Lord Byng which culminated in a constitutional crisis in Canada in 1926.[11]

It has been asserted that a Governor cannot dissolve the legislature without advice from his ministers.[12] Such a question arose in Tasmania in 1914.[13] The Governor of Tasmania offered a commission to Mr Earle, the leader of the Labour Party, upon the condition that an immediate dissolution of Parliament should take place. Previously, a motion of no confidence had been passed against the Liberal Ministry and the latter had sought a dissolution which was refused. However, Mr Earle, after having been sworn as Premier, refrained from advising a dissolution although he accepted office on such a condition. The Governor tried to force a dissolution and the Premier stated on 7 April 1914 that a dissolution was contrary to his advice. The Assembly protested to the Colonial Office about the Governor's action. The Secretary of State (Mr L. Harcourt) ruled that the Governor's action was "not in accordance with constitutional practice"[14] and that[15]

> the observance of the principles of responsible government requires that a Governor must be clothed with ministerial responsibility for all acts in relation to public affairs to which he is a party as head of the Executive.

---

10 The requests were made in August 1904, June 1905 and June 1909: Evatt, op. cit., 50.

11 Ibid., 55 et seq.

12 A.B. Keith, Selected Speeches and Documents on British Colonial Policy, (1918) Vol. II, 139 et seq.

13 Idem.

14 Ibid., 137.

15 Idem. The Harcourt dispatch on this point has been supported by Evatt, op. cit., 32-34; but criticised by Keith, op. cit., 157.

The position as to dissolution in Fiji:

Fiji has not been content to leave the question of the prerogative of the Crown as to dissolution to the absolute and unfettered discretion of the Governor-General who was to be expected to exercise such powers according to usage and custom prevailing in the United Kingdom and other Dominions. Dissolution has been made the subject of express provisions in the Constitution. Section 70(1) of the Constitution provides;

> The Governor-General, acting in accordance with the advice of the Prime Minister, may at any time prorogue or dissolve Parliament:
>
> Provided that -
>
> (a) if the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either resign from his office or advise the Governor-General to dissolve Parliament within seven days or at such later time as the Governor-General, acting in his own deliberate judgment, may consider reasonable, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament;
>
> (b) if the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament.

Prime facie it appears that, except in two specified cases, the Governor-General cannot dissolve Parliament without the advice of the Prime Minister. This provision for the Governor-General to dissolve only in accordance with the advice of the Prime Minister seems to be in accordance with the custom and usage prevailing in the United Kingdom and other Dominions of the Empire era.[16] However, even if the Prime Minister does advise dissolution, it does not necessarily follow that the Governor-General is bound to accept the advice. He retains a discretion inasmuch as section 70(1) says that the Governor-General "may" dissolve Parliament on receipt of such advice. Moreover that provision names two situations where the Governor-General may dissolve Parliament without the advice of the Prime Minister.[17]

---

16 See p.594, ante.

17 Constitution: s.70(1)(a) and (b).

It is submitted that if the intention of the framers of the Constitution was to spell out in some detail those matters pertaining to the dissolution of Parliament which had traditionally been left to convention and usage, such intention has failed. It is clearly apparent that the discretion of the Governor-General in Fiji remains almost unfettered. It seems that conventions and usage prevailing in the United Kingdom in particular and the Dominions generally will continue to be applicable to Fiji. The Constitution is silent as to when the Governor-General must dissolve Parliament. All it does is to say when the Governor-General may dissolve Parliament without advice. Of course, it does confer power to grant a dissolution at the discretion of the Governor-General, should the Prime Minister so advise.

Nonetheless, it is submitted, what remains a convention in the United Kingdom and other Dominions that the Queen (or the Governor-General) will not force a dissolution without advice was intended to be a rule of strict law in Fiji. It cannot be denied that dissolving Parliament is a very important prerogative power. So far as Fiji is concerned, the prerogative is delegated to the Governor-General by section 70(1) of the Constitution. The effect of legislation on the exercise of the prerogative powers was considered by the House of Lords in Attorney General v De Keyser's Royal Hotel Limited.[18] Lord Dunedin said:[19]

> [I]t is equally certain that if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think the observation of the learned Master of the Rolls is unanswerable. He says: 'What use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?'.
>
> The prerogative is defined by a learned constitutional writer as 'The residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown'. Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.

---

18 [1920] A.G. 508.

19 Ibid., 526.

Lord Atkinson, after quoting what he described as a pregnant passage from the judgment of the Master of the Rolls in De Keyser's Royal Hotel, Ltd. v The King[20] said[21]:

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of the powers conferred by a statute, if the Crown were free at its pleasure to disregard these provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do. One cannot in the construction of the statute attribute to the Legislature (in the absence of compelling words) an intention so absurd. It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word 'merged' is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: That the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance. Whichever mode of expression be used, the result intended to be indicated is, I think, the same - namely, that after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed, however unrestricted the Royal Prerogative may theretofore have been.

Section 70(1) states that "The Governor-General, acting in accordance with the advice of the Prime Minister, may at any time ... dissolve Parliament ...." This provision, it is submitted, does impose a limitation or condition upon the exercise of the prerogative. It places a duty on the Governor-General to act in accordance with the advice of the Prime Minister if he is minded to dissolve Parliament. Section 70(1) is a permissive section but within its ambit, it imposes a legal obligation. The exercise of the discretion to dissolve Parliament is not unfettered. An obligation is placed on the Governor-General to act in accordance with the advice of the Prime Minister. The provision, it is submitted, is mandatory and not merely directory.[22] As has been

---

20 [1919] 2 Ch. 197.

21 [1920] A.C. 508, 539.

22 Cf. Simpson v Attorney General [1955] N.Z.L.R. 271.

seen, section 70(1)(a) and (b) specifically provide for two circumstances in which the Governor-General may force dissolution without advice. Under the expressio unius exclusio alterius rule such express mention implies exclusion of other circumstances. Hence, it is submitted that only in these two circumstances can the Governor-General act with unfettered discretion. If the circumstances do not fall within their ambit, the Governor-General cannot force a dissolution but must act in accordance with the advice of the Prime Minister. Difficulty is created by section 78(3) of the Constitution, the result of which is that the Governor-General need not take advice before a dissolution because the courts have no power to inquire whether the dissolution was in accordance with the advice of the Prime Minister. Section 78(3) provides:

> Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

The effect of this provision is to enable the Governor-General to do what he likes as regards dissolution. If he wishes to dissolve Parliament without advice, there will be nothing to inhibit him from doing so except perhaps popular criticism. Legally, he will be able to do so with impunity. Although section 70(1) seems to require the Governor-General to exercise his powers on the advice of the Prime Minister, section 78(3) renders such a provision or requirement legally ineffective.

It has been pointed out[23] that in the United Kingdom or New Zealand, neither the Queen nor a Governor-General can of their own decision force a dissolution because the Orders in Council authorising a dissolution must be signed by a Minister of the Crown. In Fiji there is no such constitutional, statutory or conventional requirement; nor does the Governor-General require the co-operation of his Ministers. The order

---

23 Northey, op. cit., 198.

for dissolution is signed by the Governor-General personally.[24] In fact it is also interesting to note that in New Zealand, in case of a general election, the Governor-General is required, to issue, not later than seven days after the dissolution or expiry of the last Parliament, a warrant in the form prescribed, directing the Clerk of the Writs to proceed with the elections.[25] The prescribed form of warrant is to be signed by the Minister of Justice.[26] On receipt of this warrant, the Clerk of the Writs is required, within three days, to cause writs to be issued to the Returning Officers.

In Fiji on the other hand, in the case of a general election, the Governor-General is required to issue, not later than sixty days after the dissolution of the last Parliament, writs of election under the

---

24 E.g., an order for dissolution of Parliament which appeared in Fiji Royal Gazette (1972) 121 reads as follows:

"Fiji Independence Order, 1970

R.S. FOSTER
Governor-General

PROCLAMATION
(No. I of 1972)

BY His Excellency Sir Robert Sidney Foster ... Governor-General and Commander-in-Chief of Fiji.

IN exercise of the powers conferred upon me by subsection (1) of section 70 of the Constitution, I, acting in accordance with the advice of the Prime Minister, do hereby dissolve Parliament with effect from the 13th day of March, 1972.

Given under my hand and the Public Seal of Fiji at Suva this seventh day of March, 1972.

GOD SAVE THE QUEEN."

25 Electoral Act 1956, s.70.

26 Ibid.

public seal of Fiji to the proper returning officers.[27] Such writs of election are in fact also signed by the Governor-General.[28] Accordingly it is submitted that should the Governor-General dissolve Parliament without advice, the courts must have recourse to the provisions of the Constitution and not to the constitutional conventions or usages elsewhere.

British constitutional history offers only a general negative guide as to the restrictions of the powers of the Governor-General in relation to dissolution. It is conceded that the Fiji Constitution does embody much of the constitutional practices and principles of the United Kingdom. Many of its provisions, including those relating to dissolution of Parliament, are similar to the conventional rules. But it must not be forgotten, as Lord Bryce said, that the British Constitution "works by a body of understandings which no writer can formulate".[29] This is not the case in Fiji where the Constitution is a written instrument formulating with relative precision the powers and duties of the various agencies created by the Constitution. As Viscount Radcliffe pointed out,[30] such an instrument stands on its own and the rules it contains are superior to all other laws and practices. Although it may be useful on occasions to draw on British practice or doctrine in interpreting a doubtful or ambiguous phrase, in the final analysis it is the wording of the Constitution itself that is to be interpreted and applied. [The Constitution can never, as Viscount Radcliffe observed, be overridden by the extraneous principles of other Constitutions which have not been explicitly or by necessary implication incorporated in the instrument itself.] The right of the Governor-General to dissolve Parliament, which is explicitly recognised in the Fiji Constitution, must be interpreted according to the wording of its own limitations and not to limitations which that wording does not import.

---

27 Constitution, s.69(3) and Electoral Regulations 1971, s.16(1).

28 See (1972) Fiji Royal Gazette 121-138 for particular instances of such writs being signed by the Governor-General.

29 Cited in Adegbenro v Akintola [1963] A.C. 614, 631.

30 Idem.

No doubt the Governor-General is invested with responsibilities that on occasions will require of him a delicate political judgment. The provisions of sections 70(1)(a) and (b) and 78(3) make that clear. These provisions do invest him with powers to force dissolution whenever he chooses and for whatever motives or reasons he may deem fit. He may be ill-advised to exercise such powers arbitrarily and without advice. However, it is one thing to point out the dangers of a Governor-General arriving at any conclusion as to dissolution except upon the advice of the Prime Minister and quite another to say what his constitutional powers are. There would be indeed such dangers in a Governor-General acting alone in relation to a dissolution of Parliament. He may judge the situation wrongly and so discover that he has taken a critical step in a direction which is proved to be contrary to the wishes of the majority of the House or electorate. He would then have placed himself and the constitutional sovereign power he represents in conflict with the will of the elected House of Representatives whose majority is for the time being expressed in the person of the Prime Minister. The impartiality of the constitutional sovereign will have been compromised. These agruments suggest that the Governor-General should confine himself to acting in accordance with the advice of the Prime Minister.

The possibility of a Governor-General exercising such powers arbitrarily must be acknowledged. The risk of a Governor-General acting alone is increased if the office is held by a local man who had previously been active in party politics. There have been various criticisms levelled against appointments of local persons to the office of Governor-General.[31] A local national may incur the risk of charges of political partisanship when exercising his discretionary powers in constitutional crisis.[32] The difficult position of a local Governor-General has been well summed up by Professor Northey:

---

31 E.g., see Northey, op. cit., 64; A.B. Keith, Letters on Imperial Relations, Indian Reform, Constitutional and International Law 1916-1935 (1935), 103-106 Halsbury's Laws of England, (3rd. ed., 1953) Vol. V, 466.

32 Halsbury's Laws of England (3rd ed., 1953) Vol. V, 466.

> "The Governor-General, like [Her] Majesty, is expected to remain aloof from politics, and it is almost impossible to expect complete impartiality from local appointees who have, in some instances, been prominent supporters of the Government which secured their appointment."[33]

Experiences in various countries[34] have shown that impartiality could not be expected from the partisan nominees. Partisanship is much more likely when a local appointment is made.[35] In Canada, for instance, it had been found necessary to remove several Lieutenant-Governors, who were local appointees, from their offices before the expiry of their normal terms, because these officers had failed to perform their duties impartially.[36]

The difficulties of a local Governor-General are accentuated in Fiji by the political climate not present in most of the other Commonwealth countries. Politics in Fiji centres on appeals to communal sentiments. At present, indigenous Fijians have a dominant position in the government of the country. If the National Federation Party, the Opposition party in the House of Representatives, and a predominantly Indian party,[37] were to form the government, an Indian would almost certainly become the Prime Minister. The great majority of native Fijians would find it very difficult to accept this possibility. The present Governor-General may also find himself in a very embarrassing and critical situation.

The present Governor-General of Fiji, Ratu Sir George Cakobau, is the direct descendant of Ratu Cakobau, who was the traditional "King" of Fiji and who ceded Fiji to Great Britain in 1874. Sir George is the Vunivalu of Bau and one of the paramount chiefs of Fiji. He has been a prominent Fijian chief and leader for a long time. He was the Minister for Fijian Affairs and Local Government before he became the Governor-General in 1973.

---

33 Northey, op. cit., 64.

34 E.g. Irish Free State, Canada and Australia.

35 Northey, op. cit., 65.

36 Idem.

37 Of the 18 members of the Opposition Party in the House of Representatives only 3 are Fijians and one is Chinese.

Tradition is of paramount importance to Fijians.[38] The present Governor-General is looked upon by the Fijians not only as a political head but also as a traditional head. [If the National Federation Party won an election, the appointment of an Indian as Prime Minister of Fiji would be likely to arise.] Will the Governor-General give his decision as a traditional Fijian leader and "King" of Fiji or as a titular head of state who is expected to exercise his powers as nearly as possible according to English conventions and usages? There is a possibility that a Fijian Governor-General in this predicament might find himself obliged to invoke his powers of dissolution. He need not give any reason for so doing, albeit the reason would be obvious.

It is submitted that the framers of the Fiji Constitution have slavishly followed the provisions of the constitutions of other countries, particularly those of the African states,[39] without sufficient regard for the special circumstances prevailing in Fiji. It is quite apparent that the drafters attempted to spell out in some detail the matters which have traditionally been left to convention and usage; but little attention, if any, seems to have been paid to the problems and difficulties that may arise in Fiji. It is conceded

---

38 See G.K. Roth, The Fijian Way of Life (1953).

39 S.86(2) of the 1960 Constitution of the Federation of Nigeria:

The Nigeria (Constitution) Order in Council 1960,(S.I. 1960, No. 1652) provided:

> Where by this Constitution the Governor-General is required to act in accordance with the advice of any person or authority, the question whether he has in any case received, or acted in accordance with, such advice shall not be enquired into in any court of law.

The Malawi Constitution of 1964 had substantially the same provision in s.64(2): The Malawi Independence Order. (S.I. 1964, No. 916); see also s.64(2) of the Sierra Leone 1961 Constitution: The Sierra Leone (Constitution) Order in Council 1961 (S.I. 1961, No. 741); and s.79(2) of the Kenya Constitution of 1963 (before it became a republic).

that at the moment political and personal factors have so far ensured the maintenance of the "understandings" on which the Constitution is based. One may argue, on strong grounds, that because the present Governor-General, the present Prime Minister and the Leader of the Opposition all took a leading part in the formation of the Constitution, they would be fully aware of the "understandings" and "spirit" of the Constitution. However, it must be equally accepted that this "spirit" and "understanding" must give way to new factors, both political and personal. Hence if the framers of the Constitution felt obliged to spell out in detail the powers of the Governor-General in specific constitutional provisions, they should also have properly circumscribed the intended powers of the Governor-General from forcing a dissolution except in the two cases expressly mentioned. After all, this is the conventional rule in the United Kingdom. At least in the United Kingdom with its long tradition, one may safely rely on conventions and usage. But in a country like Fiji, with its short experience and multiracial society, only carefully drawn constitutional provisions explicitly prescribing the powers of the Governor-General would have been acceptable.

It is not suggested that the Governor-General should have no powers to refuse dissolution. The power of refusal is very important because it is undesirable for a Prime Minister to carry a power of dissolution "in his pocket". The power of dissolution should not be in the hands of either the Governor-General or the Prime Minister acting alone. To safeguard and uphold the democratic institution of Parliament the Governor-General should be empowered to dissolve Parliament only when acting in accordance with the advice of the Prime Minister except in the two cases falling within the provisions of section 70(1)(a) and (b) of the Constitution. Whether the Governor-General has acted in accordance with advice should become a justiciable issue and not one beyond the reach of the courts.

(iv) The Royal Assent

One of the personal prerogatives of the Monarch in the United Kingdom has been the right to assent or refuse to assent to Bills passed by Parliament. To use the language of Burke[40]:

---

40 Quoted by Professor A.V. Dicey in The Times, 15 September 1913, cited cited in Jennings, op. cit., 545.

> The King's negative to Bills is one of the most undisputed of the Royal prerogatives, and it extends to all cases whatsoever. I am far from certain that if several laws which I know had fallen under the stroke of that sceptre the public would have had a very heavy loss. But it is not the propriety of the exercise which is in question. Its repose may be the preservation of its existence, and its existence may be the means of saving the Constitution itself on an occasion worthy of bringing it forth.

The power to refuse assent to a Bill has not been exercised since the reign of Queen Anne.[41] In English constitutional jurisprudence there are opposing views as to whether at present the Crown can refuse assent. For instance, Sir Ivor Jennings concludes that the Crown cannot refuse assent except on advice.[42] Professor Dicey appears to have disagreed, for he quoted with approval Burke's language on the "veto".[43] This "right" of the Monarch to refuse assent to a Bill had been the subject of contention in relation to the Home Rule Bill of 1914. As a result of the strength, character and persistence of the opposition to home rule for Ireland, King George V eventually raised the issue with his Prime Minister, Mr Asquith. The latter advised that:[44]

> [T]he rights and duties of a constitutional Monarch in this country in regard to legislation are confined within determined and strictly circumscribed limits .... In the end, the Sovereign always acts upon the advice which Ministers, after full deliberation and (if need be) reconsideration, feel it their duty to offer. They give that advice well knowing they can, and probably will, be called to account for it by Parliament.

Assent to the Home Rule Bill in 1914 was not withheld but it is implicit in the King's reply that a Soveriegn can withhold assent in certain circumstances. As far as the Home Rule Bill was concerned, George V declared:[45]

---

41 Jennings, op. cit., 395.

42 Ibid., 400.

43 A.V. Dicey in The Times, 15 September 1913, cited in Jennings, op. cit., 545.

44 J.A. Spender and C. Asquith, Life of Herbert Henry Asquith (1932) Vol ii, 30.

45 H. Nicolson, King George V, His Life and Reign (1952), 234.

> The King feels strongly that that extreme course should not be adopted in this case unless there is convincing evidence that it would avert a national disaster, or at least have a tranquillizing effect on the distracting conditions of the time. There is no such evidence.

The implication is clearly that the Sovereign could, if desired, withhold the royal assent.

However, there is a distinction between the position in England, and that of Fiji. In England assent to Bills is an exercise of the royal prerogative which Burke has called "one of the most undisputed of the Royal Prerogatives". In Fiji, the position is different. The office of the Governor-General is constituted by the Constitution.[46] In assenting to Bills the Governor-General is not exercising the royal prerogative but acts as part of Parliament. The granting of the royal assent is an integral and essential constituent of legislative action, as a matter of law. Section 30 of the Constitution which established the Parliament in Fiji states:

> There shall be a Parliament of Fiji which shall consist of Her Majesty, a House of Representatives and a Senate.

Section 53 of the Constitution provides for the mode of exercise of legislative power. Section 53(1) states:

> The power of Parliament to make laws shall be exercised by bills passed by both Houses of Parliament (or, in the cases mentioned in Sections 62, 63, 64 and 65 of this Constitution, by the House of Representatives) and assented to by the Governor-General on behalf of Her Majesty.

It is relevant to point out that in New Zealand the office of the Governor-General is constituted not by the Constitution Act but by the Letters Patent of 11 May, 1917. However, the exercise of the power to assent to a Bill is derived from section 32 of the Constitution Act which is similar to section 30 of the Fiji Constitution. Professor Northey

---

46 Cf. the position in New Zealand where the office is constituted by the Letters Patent of 11 May 1917: New Zealand Gazette, (1919) 1213.

has, with respect, rightly pointed out:[47]

> The granting of the Royal Assent by the Sovereign is a prerogative act, whereas the granting of assent by the Governor-General of New Zealand is a legislative act. By virtue of the New Zealand Constitution Act, 1852, s.32, the Governor-General is a part of the General Assembly.

Similarly McGregor J. stated in Simpson v Attorney-General[48]

> It appears to me that there is a distinction between the position in England and that in New Zealand as to the Assent to Bills already passed by the two Houses of Parliament. In England, the Assent to Bills is an exercise of the Royal Prerogative .... But, as I regard it, the position in New Zealand is somewhat different .... In assenting to Bills in New Zealand, the Governor-General is exercising, not the Royal Prerogative, but a function as part of the General Assembly of New Zealand.

Further, it is submitted, the difference between the position of the Royal Assent in the United Kingdom and Fiji is also recognised by the different enacting clauses. In the United Kingdom the normal enacting words of the Statute are:[49]

> "Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled and by the authority of the same as follows."

In Fiji the Constitution[50] provides that the words of enactment shall be as: "Enacted by the Parliament of Fiji".

---

47 J.F. Northey, "Constitutional Law: Invalidity of General Elections" (1955) 31 N.Z.L.J. 123, 125.

48 [1955] N.Z.L.R. 271, 285.

49 Erskine May, The Law, Privileges, Proceedings and Usage of Parliament (18th ed., 1971), 476. In Conslidated Fund and Finance Bills, the usual formula is preceded by certain words which define the sole responsibility of the Commons for the grant of money or duties: idem.

50 S.53(7).

It is reasonably clear that the Governor-General is one of the three necessary elements of the Parliament in Fiji and that each component part of Parliament is exercising a legislative function as required by section 53(1) of the Constitution and not by virtue of any prerogative power.

Section 53(4) provides that:

> When a bill is presented to the Governor-General .... he shall signify that he assents or that he withholds assent.

A Bill becomes law when the Governor-General assents to the same.[51] There is no further provision as to what will happen should the Governor-General signify that he withholds assent. In effect, of course, that will amount to a veto in constitutional terms. As Campbell C.J. stated in a Canadian case,[52] "the withholding of the Sovereign's assent is equivalent to a veto, or that it kills the Bill". Certainly, should the Governor-General exercise such a power of "veto", it would compromise and undermine the democratic basis of parliamentary institutions in Fiji. The veto would be, in the words of Mr George Cave (afterwards Lord Cave and Lord Chancellor) a "challenge to democracy".[53]

Nevertheless, the Governor-General would be absolutely within his constitutional powers to exercise his veto. Since the Governor-General exercises his functions of assenting to or withholding assent as a component of Parliament, he has as much right to refuse assent as the House of Representatives or the Senate has to reject any Bill or motion before the House. The powers of the Senate to reject certain Bills have been restricted, but the House of Representatives and the Governor-General are not fettered, at least in theory, from rejecting a Bill. In any event, since the Governor-General in exercising the function of assenting to a bill is acting in a legislative capacity, being a part of Parliament, his withholding of assent would be classed as "proceedings in Parliament" and hence out of reach of judicial enquiry.

---

51 Constitution, s.53(5).

52 Gallant v The King [1949] 2 D.L.R. 425, 430.

53 The Times, 6 September, 1913, cited in Jennings, op. cit., 539.

The circumstances which would justify a Governor-General exercising his constitutional right are difficult to state. What is constitutional is not always judicious; but should assent be refused, the courts can not be concerned with expediency, or considerations of policy and propriety of the exercise of power. There are no legal restrictions which a court of law, interpreting the relevant provisions of the Constitution, can import into the written document. The court will be concerned solely with the question whether such a power of refusing assent exists. Lord Selborne explained the position thus:[54]

> The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do so, is by looking to the terms of the instrument by which, affirmatively, the powers were created, and by which, negatively, they are restricted. If what has been done is ... within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited ... it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions.

There are no fetters whatsoever on the exercise of the discretion of the Governor-General should he decide to withhold his assent. It seems that should the Governor-General personally dislike a certain measure or if it appears to him that such a measure ought not to have been passed, he has a right of veto. Hence he will be able to override the wishes of the elected majority. He will of course also be able to safeguard minority or special interests. Nevertheless, he would be frustrating the will of the elected majority, a most unfortunate state of affairs. Why should an appointed titular head of state be able to override the wishes of a popularly elected majority? In this respect also the framers of the Constitution have slavishly converted the conventions of the British constitution into rules of strict and paramount law without being aware of the latent dangers.

With these broad powers vested in him a Governor-General can create a constitutional crisis. If a measure is passed by Parliament and the Governor-General, sympathising with the Opposition's views,

---

54 R v Burah (1878) 3 A.C. 889, 904.

withholds assent, what can the country do? There are only two choices legally open. First, the country may accept the "veto" and take no further action. If the legislation was important to the majority party acquiesence would be unlikely. The other course of action is for the Prime Minister to advise the Queen to terminate the appointment of the Governor-General and appoint someone who would be unlikely to withhold his assent.[55] There is little likelihood of either the Queen or the Prime Minister terminating the appointment of the present Governor-General. In the unlikely event that the Governor-General has been replaced, it will be necessary for the Bill to be presented to his successor for assent. Once a Governor-General withholds consent he is functus officio, at least until the Bill is presented again to him.[56]

C. Conventions and Justiciability

(1) General

It has been said that incorporation of the rules of conventions in the constitutional instrument,[57]

> "minimises the dangers of uncertainty, that all the principal rules of the constitution will be found conveniently in one document ... that conventions merely incorporated by reference or inference may not be apt to different local conditions, and that incorporation is often in accord with the new State's desire that its constitution should be autochthonous. An additional reason ... is that when changed into legal rules, the conventions 'acquire the greater psychological sanctity attached to legal rules and ... violations of them become cognisable by the courts'. The breach of the convention - if there is one - is clearer and presents a more specific challenge to those who are affected."

---

55 E.g., in 1932 Mr De Valera, the Prime Minister of the Irish Free State, removed the then Governor-General from office in order to secure the passage of certain Bills; Northey, op. cit., 25-26. As to this topic of royal assent and the removal of Governors-General generally, see Northey, op. cit., 16-27, 57-68, 134-150 and 190-197.

56 Gallant v The King [1949] 2 D.L.R. 425.

57 Professor K.J. Keith, "The Courts and the Conventions" (1967) 16 I.C.L.Q. 542.

It is submitted that the attempted incorporation in the Constitution of Fiji of the conventional rules has secured little, if any, practical advantage. The most important conventions pertain to the relationship between the Head of State and his Ministers. In fact if one looks back through the centuries of constitutional history, both in the United Kingdom and the Dominions, it will be found that the conventional rules governing that relationship have played a prominent, if not dominant, role in most important constitutional issues. But the attempt to incorporate these conventions in the Fiji Constitution has resulted in greater and not less uncertainty. The only instances where greater certainty has been secured are the powers or rather the restrictions on the powers of the Governor-General to remove a Prime Minister and the power to refuse assent to a measure. In the former case there seem to be only two occasions where the Governor-General can force the removal of a Prime Minister.[58] In the latter, an unqualified discretion has been conferred.[59]

It will be remembered that Dicey[60] divided the rules which make up constitutional law into two distinct classes. The first class deals with laws strictu sensu and which, whether they are enacted as legislation or derived from common law, are justiciable and hence enforced by courts. The second class includes such rules as "consist of conventions, understandings, habits or practice",[61] which are not strictly laws because they are not enforced by the courts. The latter class he called the "conventions of the constitution". Conventions are susceptible to change depending upon the circumstances and are not enforceable by courts. As Anson says:[62]

> It follows from the nature of conventions that they are not absolutely fixed, nor are they enforceable by legal means.

Dicey and Anson assert that the courts in the United Kingdom do not enforce the conventions because they are susceptible to change

---

58 Constitution, s.70(1)(a) and (b).

59 See p.612, ante.

60 Dicey, op. cit., 23.

61 Idem.

62 Anson, Law and Custom of the Constitution (4th ed., 1909), Vol. II, Part 1, 15.

and are not derived from the common law. The Privy Council in Adegbenro v Akintola[63] confirmed this view. It seems that constitutional conventions in the United Kingdom can be made legally enforceable only if they are incorporated in legislation, as was done for instance, in the Parliament Act 1911 and the Statute of Westminster 1931. This does not mean that conventions cannot develop in relation to a written constitution. And in the interpretation of a written constitution on the Westminster model, the unwritten English conventions can be used as a "general guide". But it must not be forgotten that "it is in the end the wording of the Constitution itself that is to be interpreted and applied".[64]

Most of the conventional rules of English constitutional jurisprudence have been incorporated into the written Constitution of Fiji. But despite this, most of the important and basic conventions so incorporated remain non-justiciable because of the effect of section 78(3) of the Constitution. Why incorporate conventions in a written instrument when they cannot be enforced by legal means? The only possible advantage is that all the important conventions are incorporated in one document.

(2) Justification for Justiciability

This leads to the important question whether the concept of non-justiciable provisions, particularly those relating to conventions, is justified in Fiji. Essentially three factors have been presented in support of the argument that the conventions should not be made justiciable.[65]

First, it has been argued[66] that matters should not become justiciable if a decision rendered by the court will be ineffective.

---

63 [1963] A.C. 614. See also H.H. Marshall, "Interpretation of the Constitution of Western Nigeria: A Privy Council Decision," (1964) 13 I.C.L.Q. 280, 284.

64 [1963] A.C. 614, 631.

65 Keith, loc. cit., 544 et seq.

66 Idem.

Hence the English courts have on numerous occasions refused to make a declaration on the ground that the decision attacked would remain unaffected by the declaration.[67] The argument continues that in cases of high political import it is much more likely that effect will not be given to the decision of the Court. Instead, a constitutional amendment may be promoted to overcome the decision.

The second factor is that matters such as the dismissal of a Prime Minister ought to be resolved politically and by the electorate. As Justice Frankfurter stated in his dissenting judgment in Baker v Carr:[68]

> [T]here is not under our Constitution a judicial remedy for every political mischief .... In [such a] situation ... appeal for relief ... must be to an informed, civically militant electorate. In a democratic society like ours, relief must come through an aroused popular conscience that sears the conscience of the people's representatives. In any event there is nothing judicially more unseemly nor more self-defeating than for this court to make in terrorem pronouncements, to indulge in mere empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope.

The third factor presented in the argument is "the lack of judicially discoverable and manageable standards for resolving"[69] the dispute. A court is not the best equipped body to decide a question where the relevant elements in the decisions are so vague, and where "the 'actual facts', 'good sense' and 'political' considerations are to be balanced and mixed in a way which is no where prescribed".[70]

It is submitted that the above arguments do not sufficiently outweigh the necessity or desirability of making justiciable the conventions specifically incorporated in the Fiji Constitution.

---

67 Idem., citing Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd. [192]1 2 A.C. 438, 445. For detailed discussion on this subject see I. Zamir, The Declaratory Judgment (1962); see also C.J. Borrie, "The Advantages of the Declaratory Judgment in Administrative Law", (1955) 18 Modern L. Rev. 138.

68 368 U.S. 186, 270 (1962).

69 Ibid., 217.

70 Keith, loc. cit., 547.

English constitutional conventions, so far as they are relevant and applicable in Fiji, have been sufficiently dearly enshrined in the Fiji Constitution. In Fiji it is to be doubted that there is "lack of judicially discoverable and manageable standards". Whereas in the United Kingdom the conventions are not fixed and are capable of being changed, in Fiji practically all the conventional rules have been incorporated in the written Constitution. Hence the courts do have clear rules to apply. Consequently, the areas of uncertainty as to what the conventions are would be of little significance because the courts would be applying and interpreting the conventions, as written, according to the ordinary rules and principles of statutory construction applicable to other written laws.

It is conceded that in some cases "thetexture of a rule is too open, its contents too indeterminate, for adjudication to be appropriate".[71] For instance, it will be difficult to adjudicate upon such a matter as responsibility of the Ministers. But in such cases it will hardly be necessary or even possible to invoke such provisions for any useful purpose. Such a conventional rule is merely an understanding amongst the Ministers which is necessary for the proper functioning of the Cabinet system. It is difficult to envisage a situation where any breach of that convention will provide a cause of action or sufficient locus standi for any individual to wish to "enforce" the convention. In any event to use the less significant conventional rules as a ground to justify non-justiciability of all conventional rules is to take a very narrow and academic approach to the problem.

The terms of the Fiji Constitution are such that most, if not all, of the conventional rules could be made justiciable. For instance, section 97 has laid the necessary foundation and pre-requisites for the justiciability of the various provisions in the Constitution, be they related to what are merely conventional rules in the United

---

71 S.A. de Smith, op. cit., 86.

Kingdom or otherwise.[72] Section 2 makes the Constitution supreme over "any other law".[73] Where theConstitution has incorporated conventional rules in mandatory terms, so that a breach of any s uch provision would satisfy the requirements of section 97, it can be asserted with reasonable confidence that the matter should be treated as justiciable. There are provisions relating to the exercise of the functions of the Governor-General which would satisfy these requirements but which have been excluded from the jursidiction of the courts by section 78(3) of the Constitution. There the issue will be non-justiciable because of such an express exclusionary section of the Constitution and not because of general principles.

The jurisdiction of the Courts concerning the exercise of the Governor-General;s powers is greatly undermined by section 78(3) which provides:

> Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

The established principle of law upon which a statutory discretion must be exercised was set out by Lord Greene M.R. as follows:[74]

---

72 S.97 provides:

> "(1) [I]f any person alleges that any provision of this Constitution ... has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief ...."

73 This subject has been dealt with elsewhere, see p.213 , ante.

74 Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 K.B. 223, 229.

> [A] person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.

In relation to regulations passed by a Governor-General the New Zealand Supreme Court has held that[75]

> [A]ny question of law which the Governor-General is required to decide as a basis for his opinion must always be examinable by the Court .... Moreover, the Court may, in my view, always inquire, in any case, whether the Governor-General (or the Minister as the case may be) could reasonably have formed any opinion, on law or on fact, which is set up as a foundation of the regulations.

When a statutory power is conferred on a competent authority, that authority is not necessarily made the sole judge of what its powers are as well as the sole judge of the way in which it may exercise such powers.[76] This principle, it is submitted, ought to apply a fortiori to the wielding of constitutional powers. The Constitution is the fundamental law of the country. In Fiji all the governmental agencies - executive, legislature and judiciary - depend upon the Constitution for the exercise of their powers. It has been seen that the judiciary is the guardian of the Constitution. Acts of Parliament are subjected to judicial review.[77] When the actions of the elected representatives of the people are subject to such a review, there does not seem to be any cogent reason why the actions of an appointed person should not also be so subject, particularly when the latter commands such vital and important powers as dissolving the House of Representatives. There is nothing derogatory in making the exercise of the Governor-General's powers subject to judicial review.[78] After all in the constitutional crisis in other countries[79] involving the Governor-General or the Governor, the prestige of the office suffered "partial eclipse ... by having been brought into the arena of politics".[80]

---

75 Reade v Smith [1959] N.Z.L.R. 996, 1000.

76 Commissioners of Customs and Excise v Cure and Deeley Ltd. [1962] 1 QB.

77 P.183, et seq., ante.

78 See p.626, et seq., post.

79 E.g., Canada, Australia, Nigeria and Sarawak.

80 Northey, op. cit., 320.

Section 70(1) of the Constitution empowers the Governor-General to dissolve Parliament while "acting in accordance with the advice of the Prime Minister". A distinction has been rightly drawn between a power coupled with a duty and a complete discretion. In the former case enabling words are said to have "compulsory force".[81] In the latter case the only question that remains is whether the person having a complete discretion exercises the power lawfully.[82]

It is reasonably clear from section 70(1) of the Constitution that the Governor-General was intended to act in accordance with the advice of the Prime Minister in proroguing or dissolving Parliament.[83] To allow the Governor-General to so act without advice would be to give him power to ignore the obvious intention of the Constitution. The words of Lord Radcliffe in Nakkuda Ali v Jayaratne[84] are apposite:

> "But if the question whether the condition [for the exercise of power] has been satisfied is to be conclusively decided by the man who wields the power the value of the intended restraint is in effect nothing."

Section 78(3) of the Constitution seems to override a very basic principle. The only justification for such a provision seems to be the reliance on the traditional exercise of such powers by the Sovereign in the United Kingdom. Fiji cannot afford to follow the English conventions without modifications to suit local conditions. The Sovereign in the United Kingdom is guided by centuries of tradition and years of experience. Also, as Professor Northey has rightly pointed out[85]

> "The position occupied by [Her] Majesty and the Governors-General in relation to the affairs of the United Kingdom and the Dominions respectively are not identical; the [Queen] occupies a position far higher and of greater importance than the Governor-General who derives his appointment and prerogative powers from the Crown ....

---

81 Julius v Lord Bishop of Oxford (1880) 5 App. Cas. 214, 225, per Lord Cairns.

82 Padfield v Minister of Agriculture, Fisheries and Food [1968] A.C. 997.

83 However he is not bound to accept the advice to dissolve or prorogue Parliament. If he does dissolve or prorogue, then he must act in accordance with the advice, see p.600et seq., ante.

84 [1951] A.C. 66, 77.

85 Northey, op. cit., 20.

> The Governor-General is the representative of the [Queen], a position which itself suggests a difference in status; [Her] Majesty has not conferred on the Governor-General ... all the royal prerogatives."

Furthermore, judicial review of legislation is out of question in the United Kingdom.[86] In Fiji, judicial review of legislation is very much a part of the system and the judiciary has been granted the power to be the guardian of the Constitution generally.[87] Section 97 of the Constitution gives specific powers and a right by which a breach of the Constitution can be ventilated.[88] But section 78(3) seems to take away the powers of the Courts to examine the exercise of the functions by the Governor-General under the Constitution. Yet some of his powers, for example regulations made by the Governor-General in Council, have been made subject to judicial review.[89] It is respectfully but strongly submitted that section 78(3) ought to be repealed and the exercise of all functions of the Governor-General be made subject to judicial review. A lesson must be learnt from the experiences of the constitutional crisis of other countries. Professor Northey has, with respect, aptly observed:[90]

> "It is appreciated that the occasions on which differences have arisen as to the ambit of the powers of Governors-General have been few, but in those cases controversy has raged fiercely as to the propriety of the decision taken by the Governor-General."

If section 78(3) is repealed, the matter will become relatively straightforward and that provision will cease to be a bar to the enforcement of the Constitution. Subsequent consideration of the justiciability of conventions will proceed on the assumption that section 78(3) has been repealed.

(3) Enforceability

The first contention against justiciability, that the courts are

---

86 See p.159, et seq., ante.

87 P.183et seq., ante.

88 See p.620, ante.

89 E.g., Reade v Smith [1959] N.Z.L.R. 996.

90 Northey, op. cit., 320.

reluctant to render decisions, particularly those of high political import, which will be ineffective, is not seen as having significant practical importance in Fiji. In the first place, it is contended that political factors should be ignored by the courts. If a case arises where the court in Fiji is asked to rule on the constitutionality of, say, the dissolution of Parliament, it will be the duty of the court to rule on the legality of the actions of the Governor-General. In the words of Sir John Latham C.J.,[91]

> [T]he controversy before the Court is a legal controversy, not a political controversy. It is not for this or any other court to prescribe policy or to seek to give effect to any views or opinions upon policy.

The Privy Council has declared:[92]

> The duty of the court, and its only duty, is to expound the language of the (constitution) in accordance with the settled rules of construction.

The court's functions are limited to interpreting and applying the terms of the relevant provisions of the Constitution. If the provisions of the Constitution do not empower the Governor-General to dissolve Parliament, the courts should not refrain from so ruling. This is confirmed by section 97 of the Constitution which specifically provides that if any person alleges that any provision of the Constitution (not being a provision relating to fundamental rights) has been contravened and that his interests are being or are likely to be affected by such contravention, that person may apply to the Supreme Court for a declaration. And, as will be seen presently, any member of the House of Representatives[93] will have sufficient interest to seek such a declaration.

In granting a declaration, too much should not be made of the

---

91 South Australia v The Commonwealth (1942) 65 C.L.R. 373, 409. Cf. Chandler v Director of Public Prosecutions [1964] A.C. 763.

92 Vacher and Sons Ltd. v London Society of Compositors [1913] A.C. 107, 118.

93 On dissolution of Parliament the tenure of the members of the Senate is not affected; s.47(1) of the Constitution.

question of enforceability. The courts do make bare declarations if they are satisfied that the case is, on the merits, a proper one.[94] Admittedly, mandamus will not lie to the Governor of a State to compel him to do an act in his capacity as Governor[95] and it is probable that an injunction or prohibition will not lie against the Governor-General. But a declaration does not convey the element of compulsion inherent in mandamus, injunction or prohibition. Moreover, the Constitution recognises the role of the court in relation to the Constitution. The Supreme Court in Fiji has the power of judicial review of legislation, which enables it not only to examine and declare whether a statute is in conflict with the provisions of the Constitution but also to determine whether a measure is in fact an "Act" of Parliament. It is contended that the Supreme Court in Fiji also has the power to declare whether a purported measure was in fact enacted by "Parliament". Hence, if the Governor-General attempts to dissolve Parliament unconstitutionally and the court declares the dissolution to be unconstitutional, no measure "passed" by a subsequent "Parliament" will be valid because it has not been passed by a legitimate "Parliament".[96] In this way the court will be able to "enforce" its declaration. In such cases the question of paramount importance will be whether the question of the composition of Parliament is justiciable.

There have been a number of decisions which show that matters affecting the composition of legislative bodies are justiciable in certain circumstances. Thus in Taylor v Attorney-General of Queensland,[97] the primary issue was whether the Upper House in Queensland had been lawfully abolished; the court held it had.[98] Similarly the abolition

---

94 Har-Shefi v Har Shefi [1953] P. 161, 166 and 172; Louden v Ryder [1953] C.H. 423, 429; Electric Development Co. of Ontario v Attorney-General 1911 1 K.B. 410; Tonkin v Brand [1962] W.A.R. 2.

95 The King v The Governor of the State of South Australia (1907) 4 C.L.R. 1497.

96 However not all subsequent Parliament will be affected; see p.629 et seq, post.

97 (1917) 23 C.L.R. 457.

98 See also Clayton v Heffron (1960) 105 C.L.R. 214.

of the Upper House of New South Wales was subject to specific enquiry in Attorney-General of New South Wales v Trethowan;[99] the court held that the House had not been abolished. In Harris v Donges,[1] the Supreme Court of South Africa examined the composition of a sovereign legislative body to see whether it was "Parliament" for the purposes of the legislation in question. The Privy Council has also had occasion to examine the composition of various legislative bodies.[2]

In the United States too, the Supreme Court has been prepared not only to intervene in electoral redistribution disputes and acknowledge the existence of certain constitutional requirements in that respect, but has also held that the courts are capable of granting appropriate equitable relief to ensure compliance with those requirements.[3]

If the question of the validity of the abolition of an Upper House is justiciable, there cannot be any cogent reason for refusing to treat the validity of the dissolution of a Lower House as a justiciable issue. In the cases dealing with the abolition of an Upper House the courts inquired whether the necessary manner and form requirements prescribed by the Constitutions had been complied with. It is submitted that essentially the same question will arise in the review of the exercise of the power of dissolution for, in deciding whether the Governor-General validly exercised his power of dissolution, it will be necessary to determine whether the new Parliament has a legal standing inasmuch as there cannot be two Houses of Representatives in existence.

Section 37(1) of the Constitution gives specific jurisdiction to the Supreme Court to hear and determine any question whether "any person has been validly elected as a member of the House of Representatives".

---

99 (1931) 44 C.L.R. 394. As to fuller treatment of this case see p.200, ante.

1 [1952] T.L.R. 1245. As to fuller treatment of this case see p.196, ante.

2 E.g., Attorney-General for the Province of Prince Edward Island v Attorney-General for Canada [1905] A.C. 37; Attorney-General for Nova Scotia v Legislative Council of Nova Scotia [1928] A.C. 107; Katikiro of Buganda v Attorney-General [1961] 1 W.L.R. 119.

An application can be made by any person registered as a voter for the purpose of electing members of the House of Representatives or by the Attorney-General.[4] It is submitted that at least in such a proceeding the validity of the dissolution of the previous Parliament can be raised. Such a question directly affects the issue whether the present members have been validly elected.

(4) Jurisdiction of the Courts in Fiji

In determining any question of justiciability, the paramount issue is whether the court has jurisdiction to deal with the matter. It is submitted that, should the Governor-General unconstitutionally dissolve Parliament by acting without the advice of the Prime Minister, section 78(3) of the Constitution apart, the jurisdiction of the Supreme Court can be invoked under section 97 of the Constitution.

As far as locus standi is concerned, there seems to be little difficulty. There have been two cases in the State Courts of Australia in which it has been held that the interest of an elector is sufficient for the purpose of bringing actions in connection with electoral redistribution matters. In McDonald v Cain,[5] the plaintiffs sought to challenge the validity of legislation which dealt with the redistribution of electoral districts for the Victorian Legislative Assembly. The plaintiffs were both duly enrolled as electors and also duly elected members of the Legislative Assembly. It was held by the Victorian Full Court that the plaintiffs had sufficient standing to challenge the validity of the legislation principally on the ground that electors had a right to vote in particular electorates. However, there was also some suggestion that they had sufficient standing because of their status as members of the Legislative Assembly.[6]

---

3 Baker v Carr 369 U.S. 186 (1962); Reynolds v Sims 377 U.S. 533 (1964); Davis v Mann 377 U.S. 678 (1964).

4 Constitution, s.37(2).

5 [1953] V.L.R. 411.

6 Ibid., 420, 427, and 438-439.

Similarly in Tonkin v Brand[7] the question arose as to the application of the provisions of a certain Act which dealt with the redistribution of electoral boundaries for the Legislative Assembly of Western Australia. The plaintiffs were members of the Legislative Assembly and were also entitled to vote in the electoral divisions they represented. It was held by the Courts that the plaintiffs had sufficient standing to bring the action as electors. Wolff C.J. and Hale J. relied on the plaintiffs standing as electors.[8] Hale J. felt that the interest which the plaintiffs had as electors was not merely an interest which all members of the public had in having the law "ascertained and obeyed". Also he thought that the law not only recognised that an elector had a right to vote but also that he had a right to cast a vote of a "predetermined approximate weight".[9] On the other hand, Jackson S.P.J. expressed the view that the plaintiffs had sufficient standing both as electors and members.

The standing of a member of the Fiji House of Representatives[10] to challenge as unconstitutional a dissolution of Parliament seems even clearer. A sitting Member of the House of Representatives will obviously be a person whose "interests are being or are likely to be affected" by the alleged contravention of the Constitution by the Governor-General. The members cannot, to adopt the words of Gavan Duffy J.,[11]

> use [the] conveniences [of the House], and draw their pay and generally enjoy all the privileges and rights of the House which they would have used and enjoyed but for the premature and unlawful dissolution of Parliament. That their interests would be affected is very much apparent from their very position as Members of the House of Representatives.

The foregoing discussion has been based on the assumption that the action would take the form of a direct challenge to the validity of the action of the Governor-General. The same question can be raised

---

7 [1962] W.A.R. 2.

8 Ibid., 14-15 and 21.

9 Ibid., 21.

10 But not so the Senators. See n.93 p.594, ante.

11 McDonald v Cain [1953] V.L.R. 411, 420.

by anyone if the action takes the form of an indirect challenge. The validity of legislation can be challenged on the ground that it was adopted at a time when the House of Representatives was not constituted in accordance with the relevant constitutional provisions. It would be submitted that at the time of the passing of the enactment the House of Representatives was not legally in existence and in consequence the legislation could not have been passed by that House. In this way the Supreme Court could gain a strong position in relation to decisions of Governor-General dissolving Parliament.

The question is reduced to one basic issue: section 78(3) of the Constitution apart, can the Governor-General dissolve Parliament without the advice of the Prime Minister? As a matter of law (and not merely as a matter of convention), apart from the two instances provided for in section 70(1)(a) and (b), the Governor-General cannot dissolve Parliament without the advice of the Prime Minister. Section 70(1) enables the Governor-General to dissolve Parliament only if he is acting on the advice of the Prime Minister. This is seen as a condition precedent to the exercise of the discretion. The requirement is mandatory and not directory, a distinction made by Stanton and Hutchison JJ. in Simpson v Attorney-General,[12] when their Honours stated;

> [W]hen a provision is said to be mandatory, in contrast to directory, it means that, if the provision has not been strictly carried out, the whole proceedings are invalidated, while if the provision is said to be directory, it means that the proceedings are not invalidated by the non-compliance although the person responsible for the failure to comply may in particular cases be punishable.

The fact that the Governor-General has, at least in theory, a discretion to dissolve Parliament does not necessarily mean that he can exercise his discretion arbitrarily and without fetter. He must act on the advice of the Prime Minister except in the two cases specified in section 70(1)(a) and (b). But if the Prime Minister advises dissolution,

---

12 [1955] N.Z.L.R. 271,281.

the Governor-General is not bound to accept that advice, at least in theory. Put in another way, the Governor-General is not bound to dissolve Parliament under any circumstances but if he intends to exercise his discretion to dissolve Parliament then, except in the two cases specified, he has to act in accordance with the advice of the Prime Minister. If he does not do so, the dissolution will be null and void. Under the Constitution,[13] Parliament, unless sooner dissolved, continues for five years from the date of the first sitting of Parliament after any general election. Should the Governor-General dissolve Parliament unconstitutionally, all subsequent elections held during the constitutional term of the Parliament so dissolved will be null and void. It will not be possible to constitute a House of Representatives during the balance of the constitutional term of the Parliament so dissolved. Since the Constitution provides for the term of Parliament, the Governor-General cannot shorten the term by an unconstitutional action. However, it is submitted, the new House of Representatives, even after an unlawful dissolution of previous Parliament, can be validly constituted after the expiry of the five year period that would have elapsed if Parliament had not been dissolved. Elections held after the five year period has elapsed result in a House of Representatives which is validly constituted. If this were not accepted, no House of Representatives could be constituted after an unconstitutional dissolution. To hold otherwise would not only cause serious general inconvenience but would not promote the main object of the Constitution which is to sustain, not to destroy, the House of Representatives.[14]

Alternatively, the Courts in Fiji would be forced to adopt the view that the requirement of acting in accordance with the advice of the Prime Minister was not a mandatory but a directory provision. This was the approach adopted in Simpson v Attorney-General.[15] Under the

---

13 S.70(2).

14 Simpson v Attorney-General [1955] N.Z.L.R. 271.

15 Ibid. For comments on this case see J.F. Northey, "Constitutional Law: Invalidity of General Elections", (1955) N.Z.L.J. 123; A.G. Davis, "Invalidity of General Election", (1955) N.Z.L.J. 135.

New Zealand Electoral Act, 1927, sections 101 and 102, the Governor-General was required by Warrant to direct the Clerk of the Writs to proceed with the General Elections. The Warrant was to be issued not later than seven days after the dissolution or expiry of the last Parliament. The Clerk, on receiving the Warrant, was required within three days to issue the writs, made returnable in forty days. In 1946 the term of the House of Representatives expired on 11 October, but the Governor-General purported to dissolve it on 4 November. The Governor-General's Warrant was issued on 4 November; and the Writs were issued on 6 November. In fact, they should have been issued in terms of a Warrant to be signed within seven days of 11 October. Consequently, the Writs were made returnable on 16 December, instead of a date some three weeks earlier. It was held by the Supreme Court and the Court of Appeal that the provisions of section 101 relating to time were directory and not mandatory; and that the neglect to take within the specified times the several steps therein directed did not invalidate the election.

(5) Political Issue

The argument that what were hitherto conventional rules should not be made justiciable but left to the electorate to enforce is, in my submission, not very relevant to Fiji where the conventions have been converted into rules of law incorporated in the Constitution. The judgment of the High Court of Malaysia illustrates the difference between a constitutional and a conventional rule. In Stephen Kalong Ningkan v Tun Abang Haji Openg,[16] it was revealed that twenty-five of the forty-two members of Sarawak's Council Negri (Parliament) had indicated that they had no confidence in Dato Ningkan, the Chief Minister. This was done by a letter addressed to the Governor. The Governor dismissed the Chief Minister. The High Court held that the Governor could dismiss his Chief Minister (if indeed he had any power of dismissal at all) only after an unfavourable vote of the legislature; a letter of no confidence was insufficient. The Court suggested that

---

16 (1966) 2 M.L.J. 187. See Keith, loc. cit., 543.

even if the Chief Minister ceased to command the support of the majority and had refused to resign the Governor would have no power of dismissal. As the Court said,[17]

> Mr Le Quesne's argument (for the defendants) in effect is: if there is a gap, it must be filled: if there is no express power to enforce the resignation of a Chief Minister, that power must by implication lie with the Governor. I do not agree that stop-gaps can be, as it were, improvised. In Article 1 of the Constitution, a gap would appear to exist whenever the necessary address to remove the Governor is made to the Yang di-Pertuan Agong, and the latter refuses to dismiss him. Just because a Chief Minister or a Governor does not go when he ought to go is not sufficient reason for implying in the Constitution an enforcing power vested in some individual.

The learned judge further said:[18]

> The constitutional way out both for a British Prime Minister and for a Sarawak Chief Minister is not by dismissal but by resignation. We need not speculate on what would happen if occasion arose for a resignation, and a Chief Minister refused to resign. In the instant case, the Chief Minister has not refused to resign, and there is no power to dismiss him. He has already indicated through his counsel that he was prepared to consider a dissolution and presently an election. That political solution may be the only way to avoid a multiplicity of legal complications. Possibly all parties, and the people of this nation, in which sovereignty is supposed to lie, will wish the same solution.

The Sarawak Constitution did not positively specify the power of the Governor and the rights of the Chief Minister. in Fiji, however, the power of the Governor-General and the rights of the Prime Minister and the members of the House of Representatives are specified in sufficient detail. If a vote of no confidence in the Government is passed and the Prime Minister does not resign from his office within three days, the Governor-General can remove the Prime Minister, unless of course Parliament has been dissolved.[19] Hence the constitutional impasse that

---

17 Ibid.,194.

18 Ibid.,195.

19 Constitution, s.74(1).

arose in Sarawak can not occur in Fiji because the Fijian Constitution has sufficiently specific provisions. In the Sarawak Constitution as it stood when the crisis arose, section 6(3) provided that:

> The Governor shall appointed as Chief Minister a member of the Council Negri who in his judgment is likely to command the confidence of a majority of the members of the Council Negri ....

This provision states the conditions necessary for the appointment of the Chief Minister but there was no express provision for his dismissal. Section 7(1)[20] required the Chief Minister either to request a dissolution of the Council or tender the resignation of the Supreme Council should he cease to command the confidence of a majority of the members of the Council. But there was no express provision for his dismissal if the Chief Minister failed to act in accordance with section 7(1). In Fiji, however, a recalcitrant Prime Minister cannot act unconstitutionally with the impunity which the Sarawak case seems to suggest.

Moreover, merely because Parliament may render a judicial decision nugatory by amending the Constitution is no cogent reason, it is submitted, for including non-justiciable matters in the Constitution. It is conceded that very soon after the decisions were given in Adegbenro v Akintola[21] and Ningkan,[22] constitutional amendments rendered the decisions nullities. This can happen to any decision of a court. Tax decisions are frequently reversed by legislation but this is no reason for suggesting that tax legislation should be made non-justiciable.

---

20 S.7(1) provided:

> If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council.

21 [1963] A.C. 614.

22 (1966) 2 M.L.J. 187.

Professor de Smith advances the reason that[23]

> the kind of judicial investigation needed to establish breach of some of the rules would derogate from the dignity of the titular head of government and would generally do more harm than good.

But it will do more harm for the Governor-General to be given unchallengeable powers and for him to become involved in political controversies when those powers are abused. The Ningkan case is a classic example showing how important it is to have the power of the Governor-General justiciable. If proceedings could not have been brought in that case, the Chief Minister would have been dismissed unconstitutionally and without redress. There is no justification for exempting the Governor-General from legal proceedings in respect of his official actions. The principle that the King can do no wrong has been abandoned and should not be available to a Governor-General in whom important constitutional powers have been vested. When he has been given an absolute discretion, its exercise cannot be made the subject of judicial enquiry. An example is section 73(2) which provides:

> The Governor-General, acting in his own deliberate judgment, shall appoint as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the majority of the members of that House ....

The exercise of this power cannot be reviewed because the court cannot substitute its view for the judgment of the Governor-General. [But where the Governor-General has not been given an absolute and unfettered discretion, the exercise of his discretion should be subject to judicial review.] In such cases the Governor-General will be obliged to consider all aspects of the situation with the utmost care and avoid extraneous matters. The possibility of a judicial review will ensure that the Governor-General exercises his discretionary power carefully.

There have been various occasions in Commonwealth history where there have been divided opinions as to the propriety, or rather the impropriety, of the actions of the Governors or Governors-General.

---

23 S.A. de Smith, op. cit., 86.

Adegbenro v Akintola[24] shows that Courts may be sharply divided about the interpretation of a constitutional power. The majority of the Federal Supreme Court in Nigeria held one opinion; one Judge of the Federal Supreme Court and the Privy Council held a different view. It is obviously desirable that such vital matters should be subjected to judicial scrutiny. The courts have frequently rejected the principle that the person who wields the power should be able conclusively to decide whether the circumstances justifying the use of the power have arisen.[25] The same principle requires that decisions of a Governor-General should be subject to thescrutiny of the judiciary.

(6) The Apparent Danger of Impasse

There seems to be a suggestion that on some constitutional issues a court may make an order which is not directly enforceable, compliance with such an order being dependent upon the voluntary actions of the parties concerned. For instance in the Sarawak case of Ningkan v Openg[26] the High Court took the view, possibly obiter, that even if there was a vote of no confidence in the Chief Minister, the Governor had no power to dismiss him; the only possibility was voluntary resignation. Professor Keith, with respect, rightly poses the problem.[27]

> In such a case it is difficult to see what the courts can do; a declaration that the Chief Minister is, in terms of the Constitution, obliged to resign will hardly be effective, for almost ex hypothesi he is intransigent. More generally, in cases of high political import like the present it is relatively much more likely that the decision will not be given effect.

That observation was justified in relation to the position in Sarawak where the Constitution had failed to provide for the event. It should not arise in Fiji because the Constitution incorporates practically all of the conventional rules.

---

24 [1963] A.C. 614.

25 See pp.619et seq., ante.

26 (1966) 2 M.L.J. 187.

27 Keith, loc. cit., 544.

The Constitution contains clear and specific provisions as to the duties and responsibilities of the Prime Minister, including circumstances in which a Prime Minister must resign and/or advise the Governor-General to dissolve Parliament.[28] It makes provision for both of the incidents which occurred in Sarawak and Nigeria and indeed appears to make adequate provision for all other eventualities where an impasse might have developed in the relationship between the Governor-General and the Prime Minister. The only possible exception is refusal of assent to a Bill duly passed by the Houses of Parliament. Even there of course, the impasse would be short lived because the Government would have a strong case for the removal of the Governor-General if he withheld his assent unreasonably.

CONCLUSION:

The conventional rules evolved in the United Kingdom have been substantially reproduced, with some insignificant modifications, in the text of the Constitution of Fiji. This is particularly so in relation to the executive and the legislature. The Queen's representative, the Governor-General, is not the effective executive head of government. The executive head of Government is the Prime Minister who presides over the Cabinet composed of Ministers appointed and removed on his advice. The Cabinet is a parliamentary body inasmuch as Ministers must be members of either House of Parliament. The Prime Minister must be a member of House of Representatives. Ministers are collectively responsible to Parliament. Parliament may be dissolved by the Governor-General acting on the advice of the Prime Minister. The Governor-General has a discretion to assent or refuse assent to Bills and has therefore a virtual right of veto. In the United States, which is one of the most democratic countries, the President's veto may be overridden by a two-thirds majority in Congress. There is no such provision in the Constitution of Fiji, where removal of the Governor-General is the only action available to the government.

The framers of the Fiji Constitution, slavishly following what was done in other countries which secured their independence in the

---

28 Constitution, ss.70 and 74.

Commonwealth era, have incorporated the English conventional norms without giving sufficient attention to the circumstances of Fiji. In the United Kingdom, as has been noted elsewhere, tradition, usage and custom played prominent roles in the development of constitutional law. The British have had centuries of experience and with a monarchical regime. From the exercise of prerogative powers over this period acceptable conventional rules have developed in relation to the appointment and dismissal of a Prime Minister, dissolution of Parliament, and assent to Bills. In Fiji on the other hand there has been no such tradition.

The experience of many African countries has shown that a slavish adoption and incorporation of English constitutional practices is inappropriate. Fiji is a multiracial society with the traditions and cultures of the major components of the society - the Fijians, the Indians and the Europeans. The traditions of these races differ. For instance, the chiefly system is very important to the Fijians but not to the Indians of Fiji. The attitudes of Fijians and Indians towards the exercise of constitutional powers by a Monarch in the United Kingdom would naturally be quite different. In Fiji, the exercise of constitutional powers in relation to the dissolution of Parliament or assent to a Bill would be likely to have political and racial implications. This is apparent not only from the present Constitution itself but also from the attitude taken by leaders of various ethnic groups throughout the various stages of the constitutional development in Fiji since the turn of the century. Such facts cannot be denied. They are the realities in Fiji and must be lived with. The warning uttered by Sir John Marriott is apt.[29]

> Incidentally, I venture, perhaps superfluously, to express a hope that the English model will not be slavishly, thoughtlessly, or prematurely copied in other countries. Convinced as I am that no better Constitution has ever been devised or evolved for a people politically minded who have had long training from a representative system of local administration, in the difficult art of self-government, I am equally certain that indiscriminate imitation, if flattering to us, has often proved disastrous for the copyists.

---

29 Foreward to E.A. Forsey, The Royal Power of Dissolution of Parliament in the British Commonwealth (1943; Second impression 1968), xi.

As many of the constitutional provisions as possible should be subject to review by the courts. Most of the provisions of the Constitution have been made justiciable by sections 17 and 97. But section 78(3) of the Constitution imposes a major limitation on the powers of the court to review the actions of the Governor-General. It has been suggested that no cogent reasons have been shown for the inclusion of section 78(3). Even a slavish adoption of the United Kingdom tradition is not an adequate explanation.

Section 2 of the Constitution declares the supremacy of the Constitution over any other law. The framers of the Constitution found it necessary to incorporate in the Constitution certain conventional rules of the English constitutional jurisprudence. Those rules now have constitutional status. Not only that, they enjoy an entrenched position in the Constitution. Accordingly, it is submitted, those rules are of such importance that they must be subjected to judicial review like other provisions of the Constitution. This can be done, to a significant and satisfactory extent, simply by repealing section 78(3) of the Constitution.

CHAPTER XVII

THE SENATE

A. Introduction

In the history of great states a uni-cameral legislature is a relatively rare phenomenon.[1] Bi-cameralism is characteristic of most important states,[2] particularly in the democratic world. Democratic countries such as New Zealand, Denmark and Finland which have a uni-cameral legislature are exceptions. In New Zealand there was a bi-cameral legislature until 1950. Soon after the abolition of the second chamber, a joint Committee[3] of the members of the Legislative Council and the House of Representatives, appointed to consider the establishment of an alternative chamber, strongly recommended the establishment of a second chamber.

The second chamber is known by different names in different countries: for example, the House of Lords in Britain; the Council of States (Standerat) in Switzerland; the Federal Council (Bundesrat) in the Federal Republic of Germany; and the Senate in most other countries, including the United States, Canada, Australia, Eire, France, Italy and Fiji. The constitution of the chamber also varies. There are three bases for membership of a second chamber - hereditary, nominated and elected (partial or total). The House of Lords is a striking example of the hereditary second chamber.[4] The hereditary

---

1 C.F. Strong, Modern Political Constitutions (6th ed., 1963), 194.

2 E.g. United Kingdom, United States of America, France, Australia, Switzerland, Germany, Japan, Turkey and Canada. Cf. U.S.S.R. and China.

3 The report of this joint Constitutional Reform Committee is found in the Appendix to the Journals of the House of Representatives. (1952) Vol. IV, 1-18.

4 For a comprehensive treatment of the hereditary chamber in general and the House of Lords in particular, see Sir John A.R. Marriott, Second Chambers (2nd ed., 1927), 5-35 and 175-227; see also Strong, op. cit., 202 et seq. Significant assistance has been derived from these two sources and the Report of the New Zealand Joint Constitutional Reform Committee.

second chamber was formerly much more common. Mr C.F. Strong, with respect, rightly points out[5] that such a chamber was in most states a survival of the medieval system of government by Estates.

The Canadian Senate is an example of a nominated second chamber. It is wholly nominated by the Crown, through the Governor-General. A nominated Senate survived all the constitutional legislation applied to Canada: Pitts Act 1791, the Canada Act 1840, and the British North America Act 1867. The Senate in Canada was modelled on the House of Lords but nomination for life replaced the hereditary principle. Such a nomination system is distinguished from the hereditary principle in that while a peerage passes from father to son and cannot be resigned,[6] the office of nominated senater terminates at death, or earlier if the holder of the office so desires or if the Constitution lays down some defined period of tenure.

The United States Senate is a classic instance of a fully elected second chamber. At first, senators were chosen by State legislature, but the Seventeenth Amendment 1913 enforced popular election. A Senator in the United States is not in any sense the delegate of the government of his State, but a representative of the people of that State. There are two Senators from each State. Because they are elected at different times the two Senators from a State may come from opposing parties.

The Australian senate is another example of a fully elected second chamber. France provides another example of a fully elected second chamber in a unitary state, but the French Senate is indrectly

---

5 Strong, op. cit., 196.

6 Ibid., 201 where the Case of the Reluctant Peer is cited. In 1960 Viscount Stansgate died. His son and heir, Anthony Wedgwood Benn, who had been M.P. for Bristol East since 1950 automatically succeeded to the title and seat in the House of Lords. His seat in the House of Commons was, equally automatically, declared vacant and a by-election ordered. Wedgwood Benn not only refused both the title and the seat in the Lords but stood as a candidate for election to the vacant constituency and was re-elected by an increased majority. Thereupon the defeated candidate presented a petition to the Election Court, and in 1962 the judges declared that the new Lord Stangate was not duly elected or returned and that they had no option but to declare his defeated opponent elected. However now Peers can resign peerages; see The Peerage Act 1963.

elected. The Constitution of the Fifth Republic of France of 1958 recognised that the Senate should secure the representation of communities in the territorial divisions of the country in their collective capacity (les collectivites teritoriales). Thus 255 seats were alloted to the Departments of Metropolitan France, six to groups of French citizens abroad, and the rest to colonies and territories overseas. The election in each Department is carried out by the traditional method of voting in electoral colleges, made up of the Deputies (that is, Members of the National Assembly) of the Department, the General Councillors of the Department and delegates of the municipal councils, the seats for each Department being allotted on a population basis.[7]

Some second chambers are partly elected and partly nominated. The Italian Senate illustrates both the elective principle and the nominated principle. Most of the members of the Senate are elected on a regional basis. Besides the elected senators there are two other classes: former Presidents of the Republic have the right to become senators for life, unless they renounce their right, and the President of the Republic can appoint as senators for life five citizens of special merit in the social, scientific, artistic or literary fields.[8]

South Africa provides an interesting example of a partially elected Senate. Eight senators are nominated by the President, two from each of the Provinces. In making his nominations the President has regard to the importance of selecting those acquainted with the affairs of their Province, while one at least of the two senators from each Province should be "knowledgeable" in matters concerning the interests of the coloured population.[9] Most of the other senators are elected.

B. The Need or Justification for a Second Chamber:

(1) General:

Different reasons have been advanced for the introduction or

---

7 Strong, op. cit. 208.

8 Ibid., 211.

9 Ibid., 205.

continuation of a second chamber.[10] The British House of Lords may have been primarily the result of an accident of history[11] but the Fathers of the American Constitution well versed in political philosophy and constitutional practice, freely adopted the bicameral form of legislature after a brief experience of the unicameral. The United States Senate was included in the constitution,[12] to equalize the states and prevent the large ones from oppressing the smaller ones. This was accomplished by giving each state two Senators, so that large and small were alike.

The American Federal Senate is a very strong second chamber. Its powers are virtually co-extensive with that of the House of Representatives. Its strong position is a result of bargains made and comprises agreed upon by the fathers of the Constitution. They had free choice andopted for a strong chamber.[13]

Canada, on the other hand, does not seem to have had much free choice. The framers of the Canadian constitution appear to have preferred to adhere to the English model. This also seem to have been the preference in Australia and New Zealand (until 1950). Likewise, most of the newly independent countries in the Commonwealth seem to have perpetuated the Westminster model.

The principal functions of a second chamber in the modern democratic world were stated in relation to the House of Lords by the Bryce Committee in 1918.[14] These functions were:

---

10 See generally Marriott, op. cit.

11 See n.4 p.639, ante.

12 S.G. Fisher, The Evolution of the Constitution of the United States (1897) - cited in Marriott, op. cit. 68.

13 See Marriott, op. cit., 69-78 for a comprehensive outline of the functions of the United States Senate.

14 Second Chamber Conference on the Reform of the Second Chamber (1918).

(i) The examination and revision of bills.

(ii) The initiation of the less controversial type of legislation which may have an easier passage through the House of Representatives or the Lower House if they have been fully discussed and put into well-considered shape before being submitted to it.

(iii) The discussion and delaying of controversial proposals so that public opinion might have time to form and make itself felt. In other words there may be interposition of as much delay in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed. This would be particularly important where the fundamentals of the Constitution or new principles of legislation are involved or where the proposed measure is such that the opinion of the country may be almost equally divided.

(iv) The debating of important questions of policy. That is, a Second Chamber allows full and free discussion of large and important questions, such as foreign policy, at moments when the Lower House may happen to be so much occupied that it cannot find sufficient time for them. Further such discussions may often be all the more useful if conducted by an Assembly whose debates and discussions do not involve the fate of the Executive Government.

The New Zealand Joint Constitutional Reform Committee, set up to consider the establishment of a Second Chamber, recommended the establishment of a chamber with the following functions:[15]

(a) To take over the duties of the Statutes Revision Committee.[16]

(b) To examine all subordinate legislation.

(c) To consider all petitions to Parliament.

(d) To take over the duties of the Local Bills Committee.

(e) To have the power of amendment, but not of veto, in respect of Bills sent up by the House of Representatives. In this field it was recommended that there ought to be a power of delay for not more than two months.

---

15 See n. 3, p.638, ante. For comments on the establishment of a Second Chamber in New Zealand and/or review of the Committee's recommendations see Professor J.F. Northey, "An Experiment in Unicameralism" (1958) Public Law 265; D.J. Riddiford, "A Suitable Chamber for New Zealand" (1951) 27 N.Z.L.J. 102; D.J. Riddiford, "New Legislative Council for New Zealand". (1950) 26 N.Z.L.J. 329; D.J. Riddiford, "An Effective Second Chamber: Reasons for its Existence", (1950) 26 N.Z.L.J. 313.

16 This Committee examines a Bill of legal character in order to ensure that it achieves its purposes: Northey, loc. cit. 269.

(f) To have the power to initiate legislation. It was proposed, however, that the House of Representatives should have the right to appoint some of the members of the Committees of the Upper House which would perform the first four functions referred to above.

(2) The Position in Fiji

Until 1970 Fiji had a unicameral legislature. The 1970 Constitution created for the first time a second chamber, called the Senate. The Lower House is called the House of Representatives. The idea of a second chamber for Fiji seems to have first arisen during the political bargaining at the pre-constitutional conference talks from October 1969 to January 1970 between the representatives of the National Federation Party (the Opposition in the then Legislative Council) and the Alliance Party (the ruling party). As has been seen,[17] the Federation pressed for independence on the basis of a common electoral roll; the Alliance while agreeable to constitutional changes, was opposed to a common roll. It was in the context of this disagreement that thequestion of an Upper House was raised. An Upper House was seen as a means of allaying the fears of the Fijians. Ironically, the request for a special position for the Fijians in the Upper House together with the special powers of veto, "did not emanate from the Fijian people or its leaders ... (but) from the Opposition".[18] Mr S.M. Koya further stated,[19]

> [W]e have taken the advantage and the opportunity of declaring that there should be an added success for this House and it is this, sir, that the members of the autochthonous race, sir, that is to say the Fijians of this country should play an important and responsible role in the national politics and as has been suggested and recommended in the Report, some members of the Upper House will be nominated or appointed by the Council of Chiefs. I think by doing that, we are going to prove to the country, in particular to the Fijian people, our sincerity that we would like to proide a tangible and effective way of protecting their land, protecting their customs, their culture and their way of life generally. This indeed is a privileged position that they will occupy in the future Legislature of this

---

17 See pp. 90 et seq. ante.

18 Mr S.M. Koya, the Leader of the Opposition: Fiji Legislative Council Debates (1970) Vol. II, 56. The Opposition was predominantly an Indian Party.

19 Ibid., 187, (emphasis added).

> country .... We want to see that all their fears about their lands and other matters, as I mentioned, are allayed once and for all. The sword will be in their hands. They can use it on those matters which will be mentioned in the Constitution.

The protection and safeguards provided for the Fijians through the instrumentality of the Senate are contained in sections 67 and 68 of the Constitution, soon to be discussed. Of the twenty-two members of the Senate eight are appointed by the Governor-General upon the advice of the Great Council of Chiefs.[20]

There are certain legislations intended to benefit the Fijians and to protect their lands, customs and customary rights. The most important are the Fijian Affairs Ordinance 1944, the Fijian Development Fund Ordinance 1965, the Native Land Trust Ordinance 1940, the Rotuma Ordinance 1927, the Agricultural (Landlord and Tenant) Ordinance 1966, the Banaban Lands Ordinance 1965 and the Banaban Settlement Ordinance 1945. The framers of the Constitution felt it desirable to safeguard these enactments. Under section 68 of the Constitution none of thoes enactments can be altered, amended or repealed by ordinary majority or legislative process. Any Bill that is intended to alter any of the provisions of those enactments cannot be passed by either House of Parliament unless it is supported at the voting by not less than three quarters of all the members of the House. Moreover, any Bill affecting Fijian land, customs or customary rights, must, in addition to the above majorities, be supported by not less than six of the eight Senators appointed by the Governor-General on the advice of the Great Council of Chiefs.

Section 67 of the Constitution provides that the Constitution cannot be altered unless the Bill is supported by specified majority in each House of Parliament. To amend certain specified provisions[21] of the Constitution the support of at least a three quarters majority is required

---

20 Constitution s.45(1)(a). The entrenched position of ss.45(1)(a), 67 and 68 are discussed in some detial at pp.206 et seq., post.

21 See p. 124, ante.

in each House of Parliament. For amending sections 45(1), 67(5) and 68(2) not only at least three quarters majority in each House must support the Bill but also at least six out of the eight senators appointed on the advice of the Great Council of Chiefs must support the measure.[22] For amendments of all other provisions of the Constitution, the measure must be supported by at least two-thirds majority in each House of Parliament. The position of the Fijians is thus well safeguarded and protected by the method of appointment to the Senate and the special majorities required for the amendment of the Constitution and certain specified enactments.

The Senate in Fiji was created as a result of political bargaining. In this respect the position is similar to that in the United States, except that in the United States all the bargaining took place amongst the representatives in open debate and after much consultation with the people. In Fiji, on the otherhand, the people as a whole were virtually ignored by their "representatives", All the meeting - not only during pre-constitutional talks but also at the Conference in London - took place behind closed doors.[23] During the pre-constitutional talks in Fiji all that the people were aware of was what had been agreed upon. Brief announcements were made after agreements had been reached amongst the leaders.

Surprisingly, there appears to have been no consideration of the traditional functions discharged by a second chamber. For instance no public reference was made to the recommendations of the Bryce Committee or the New Zealand Joint Constitutional Reform Committee. Whether they were discussed behind the closed doors of the meeting room is anyone's guess; but no mention is made in the Legislative Council debates or elsewhere of those reports. It has been stated, and would appear to be the case, that the Senate was established solely to allay the fears of the Fijians. Mr S.M. Koya said that the Upper House in Fiji was created,[24]

---

22 Constitution s.67(5).

23 See p.108, ante.

24 Report of the Fiji Constitutional Conference 1970; Cmnd. 4389 (1970), 48.

> not necessarily to act as a House of Review like the House of Lords in England, but as a House of Protection for the autochtonous race .... [I]t is interesting to note that the Upper House will give the Fijian people an effective constitutional power to prevent ... any legislation being enacted against their wishes which effects their land, their customs, their culture and their way of life. It is pleasing to note that this aspect of the proposal for the establishment of the Upper House was proposed by my party and graciously accepted by the Fijian people through its leaders and Council of Chiefs.

If the main, if not the sole, reason for creating the Senate was to allay the fears of the Fijians, the same effect could have been achieved by perpetuating the system that existed under the 1966 Constitution. The legislature was then unicameral. Of the unofficial popularly elected members twelve were Indians, twelve Fijians and ten neither Indians nor Fijians. In addition, two Fijian members were elected by the Great Council of Chiefs. This arrangement was unanimously agreed to by the Fijian leaders at the 1965 Conference. It could have been continued, with two, three or even four seats being filled by the representatives of the Great Council of Chiefs in a unicameral legislature. These representatives could have exercised the same powers of veto as are given to the nominees of the Councilof Chiefs in the Senate. It is difficult to understand why it was thought necessary to create another House in order to "allay the fears" of the Fijians. The additional twenty-two members in the Senate are an expensive luxury.[25]

---

25 (i) The annual salary of the Senators is:-

(a) President - $1750
(b) Vice President - $1500
(c) Other 20 Senators - $1250

(ii) Each Senator is paid $12.50 per day as an attendance allowance.

(iii) An accommodation allowance of $12 per day is paid to each Senator living more than 25 miles from Suva.

(iv) All actual travelling costs are paid to Senators living more than 25 miles from Suva.

(v) All Senators receive a refund of full rental in respect of one private domestic telephone and 50% of all the local calls. (In Fiji each local call bears a charge).

(vi) The President is entitled to a refund of actual entertainment expenses incurred up to $500 per annum.

It may be argued that in the House of Representatives it would have been difficult for the Opposition to accept such disparity in voting power between the Indians and the Fijians. This attitude was quite apparent in the 1965 Constitutional Conference when all the Indian members objected to the disparity caused by only two more Fijian members.[26] But the problem could have been solved by giving voting rights to the Council of Chiefs representatives only in matters falling within sections 67 and 68 of the present Constitution.

Despite what has been said it is not suggested that a second chamber is not warranted in Fiji. If the sole or primary purpose of creating a second chamber was to allay the fears of the Fijians, this was not the best way to achieve that purpose. But if the traditional functions of a second chamber are considered as well as the protection of Fijian interests, a second chamber has an important role to play. The composition of the second chamber must be related to the functions it is intended to discharge. It is therefore intended that the composition of the Fiji Senate be analysed to determine whether any reforms are needed to make it an effective institution. Membership of the Senate will first be discussed and then its powers and functions.

C. The Composition of the Senate

(1) The Present Membership

The members of the Senate are appointed by the Governor-General on the advice of the Great Council of Chiefs (eight members), the Prime Minister (seven members), the Leader of the Opposition (six members) and the Council of Rotuma (one member). As there are no limits on the appointment of Senators, the appointments are effectively made by those persons or bodies.

The Senate is, at least for two major political parties, an instrument for rewarding political supporters at the expense of the taxpayer. The

---

26 See Report of the Fiji Constitutional Conference 1965; Cmnd. 2783 (1965), 12.

Fiji Senate, or at least a substantial part of it, is effectively controlled by two political parties - the ruling party and the opposition. As Professor Stephen Leacock said[27] (in relation to Canada),

> We made our Senate, not a superior council of the nation, but a refuge of place-hunting politicians and a reward for partisan adherence.

The short history of the Fiji Senate tends to show that the remarks are also applicable to Fiji. Mr R.I. Kapadia, who had earlier defected from the Federation Party, was an Alliance Party candidate for the Indian communal seat in a Southern constituency in 1966. He lost the election but when the Senate was established in 1970 he was appointed as a Senator on the advice of the Prime Minister.[28] Similarly Mr M.T. Khan,[29] a defector from the Federation Party in 1967 and an unsuccessful Alliance Party candidate in the 1968 by-election, was appointed as a Senator in 1970 on the advice of the Prime Minister. Ratu (now Sir) Penaia K. Ganilau[30] was also an unsuccessful Alliance Party candidate, in the 1972 general election, and was appointed as a Senator upon the advice of the Prime Minister.

The Opposition appears to have followed the same. For instance Ratu Mosese Varasekete was an unsuccessful Federation Party candidate in the 1972 general election. He was soon after appointed as a Senator upon the advice of the Leader of the Opposition.[31] In similar vein may be seen the appointment of Mr Eqbal Mohammed. Mr Eqbal Mohammed

---

27 Cited in Marriott, op. cit., 98.

28 The Prime Minister is also the President of the ruling Alliance Party.

29 He is now the Minister of Commerce, Industries and Co-operatives.

30 He is now the Deputy Prime Minister.

31 The Leader of the Opposition is also the President of the National Federation Party.

was a leading figure amongst the Muslim League members who advocated separate Muslim seats just before the Constitutional Conference delegation left Fiji for the 1970 Constitutional Conference. For various reasons this policy would have greatly embarrassed Mr S.M. Koya. The latter was and still is a leading figure in the Fiji Muslim League.[32] Most important, such a demand for separate Muslim seats would have cut right across the policy of the Federation Party which was pressing for the immediate introduction of a common roll and was opposed to any idea of communal representation. Surprisingly, Mr Eqbal Mohammed kept relatively quiet and does not seem to have pressed for separate Muslim Seats. Not surprisingly, he was eventually appointed to the Senate on the advice of the Leader of the Opposition.

Political affiliation is clearly reflected in the Fiji Senate. Invariably members appointed on the advice of a political leader support the policy of that leader. But the same cannot be said of the persons appointed on the advice of the Great Council of Chiefs and the Council of Rotuma inasmuch as those members would have been indirectly elected.[33] Doubtless these representatives have a definite loyalty to those bodies, but that loyalty is to be expected of them if one consider the main intention in the establishment of the Senate in Fiji.

(2) The Problems of Systems of Membership

The basic essential functions of a second chamber are supervisory and revisbnary. It is therefore very important that the persons appointed be individuals of standing and experience who represent a wide cross-section of the community. Party politics must be of secondary importance. A second chamber which merely rubber-stamps the measures passed by the House of Representatives serves no useful purpose. The present method of appointment encourages such 'rubber-stamping'.

There arethree traditional ways of selecting the members of a second chamber; they can be

---

32 In fact at present he is the "Speaker" of the Fiji Muslim League.

33 Fiji Constitution Order (Selection of Senators by Great Council of Chiefs): Legal Notice No. 114 of 1970.

(i) the holders of hereditary offices;
(ii) nominated; and
(iii)elected (directly or indirectly).

The hereditary principle calls for little elaboration; even in the United Kingdom it has been subjected to critisism. With the passage of the Life Peerages Act, 1958, it has been struck a considerable blow. This Act permits the creation of barons (other than Law Lords) and baronesses for the term of their lives only. In Fiji there is little room for hereditary principle. In England they were historical reasons for the creation of a hereditary peerage in the House of Lords. They have no application in Fiji. Also, the modern trend is to withdraw from hereditary appointments. Fiji is too small a country to create such a class. Even with the Fijians, who had strong traditional ties with their chiefs, the chiefly system is gradually giving way to equal say given to the commoners. The commoners are also establishing their equality with their chiefs.

A fully nominated chamber would not be in Fiji's best interest. Democratic principles do not allow political power to lie in the hands of a nominated body. Experiences in Canada and New Zealand (before 1950) have shown the shortcomings of a nominated body.[34] It is acknowledged that in those countries nomination was solely in the hands of the government. But even if the power of nomination is shared by government and opposition, the Senate is likely to become a place to which party supporters are appointed. If an absolute discretion is left with the Prime Minister and the Leader of the Opposition, it is too much to hope that "there would also be a tendency for each party to ensure that its representatives in the Upper House were of the highest quality available."[35] Party loyalty and the tendency to reward party supporters would remain of significant, if not paramount, importance. This is inherent in a nominative system.

---

34 Northey, loc. cit., 271.

35 Idem.

Direct election appeals to adherents of democratic ideals, but it would not necessarily produce persons of high qualifications, standing or experience. It is very important that the services of such persons be secured by the Senate. Many persons who would otherwise be well qualified to serve on the Senate are not prepared to face the rigorous task of contesting a political election. There are in practically all countries persons who might not be widely known but who would be of incalculable value in the service of the community. Such persons would be very good candidates for a second chamber. They should not be partisan, but of a cast of mind which enables them to judge political questions dispassionately and calmly and with relative freedom from bias or prejudice. It is conceded that any House of Parliament cannot escape the party spirit; but the excesses of that spirit can usually be moderated by the presence of many who do not yield to it.[36] It would be unfortunate if use was not made of the services of such persons when they could contribute so much to society. A second chamber based upon direct election would not necessarily attract members with the skills needed to carry out the special work of the Senate.

If it is accepted that the function of the second chamber is supervisory and revisionary, the elective principle may defeat the whole foundation of a second chamber. A wholly directly elected chamber must reflect party politics. If both Houses were controlled by the same party this would defeat the purpose of a second chamber or at least reduce it's effectiveness. It is difficult to ensure that two elected chambers are not controlled by the same party. If the communal system of voting, operating for elections to the House of Representatives in Fiji, were also adopted for the Senate, the representation of the political parties would be similar in each House.

If the elected principle is adopted there is a danger that the upper house may appear to be just as powerful as the lower house.[37] It could claim also to represent the popular will. All sorts of complications

---

36 Report of the New Zealand Constitutional Reform Committee, 25 et seq.

37 Ibid., 27.

could then arise, such as the deadlock in Australia in 1974 which necessitated a dissolution of both Houses of Parliament.[38]

Is indirect election under which certain groups rather than individuals elect representatives to the Senate likely to be more acceptable? Indirect election has been adopted in France.[39] The basic problem is settling the means by which representation of all sections of the community is secured. Further, if there is election by an electoral college, another question arises as to whom would such a body be responsible to.

It is submitted the problem of indirect election can be largely overcome by having a functional chamber. Certain organised sections of the community select and send representatives to the Senate. The groups responsible for selection must be such as have general recognition and acceptance. However, there would still be the problem of choosing which sections of the community should be represented. The inclusion of some organisations would lead to interminable argument as to why others were excluded.

(3) The Proposed System of Membership

The Senate in Fiji should be composed in such a way that the effect of party politics is minimised and no one party is markedly or permanently predominant. Politics in general and party politics in particular may be of some importance but they should certainly not be the controlling feature of membership.

One of the important functions of the Senate must be to ascertain the mind and views of all sections of the society and of the nation as a whole. Hence it is essential that the members of the Senate should be

---

38 Not only in Australia but also in the United States the Senate has demonstrated its independence. Also see Cormack v Cope [1974] 48 A.L.J.R. 319.

39 See p.640 , ante.

persons of experience and special qualifications who represent diverse elements in society. None of the three principles of selection already discussed would secure such members. However a combination of methods might be acceptable. This approach is a compromise which involves a careful balancing of the advantages and disadvantages of each of the principles.

It is submitted that there ought to be twenty-five members in the Senate. This figure is not an arbitrary one; it takes into account the functions and duties of the Senate to be discussed. These members should be selected:

(1) By appointment or nomination. Fifteen members should be appointed by the Governor-General acting on the advice of the Prime Minister (five members), Leader of the Opposition (four members), Great Council of Chiefs (five members) and Council of Rotuma (one member).

(2) By indirect election to represent the elements in a functional chamber. Ten members should be elected by the following:-

(a) trade unions (one member);

(b) chambers of commerce and all unions of employers (one member);

(c) legal profession (one member);

(d) medical and dental professions, chemists, architects, surveyors and engineers and all other allied professions (one member);

(e) sugar cane planters having holdings of not less than ten acres (two members);

(f) copra planters having holdings of note less than ten acres (one member);

(g) members of the House of Representatives (three members).

Question may arise as to the practicability of this method of election, of such a functional chamber. It is submitted that the difficulties would be more apparent than real.

(i) One apparent problem is the entitlement to vote for the members representing the trade unions, chambers of commerce and other unions of the employers. It is proposed that each union or chamber would be entitled to five votes to be cast by five named delegates who would

be registered on the "electoral roll" for the election of the Senators representing the unions and chambers of commerce. These five representatives must be chosen by each union or chamber concerned by means of secret ballot with only the registered (and of course financial) members having the right to vote. To avoid the formation of unions simply for the purpose of the election, it is proposed that the vote should be restricted to those unions and chambers which have been registered for at least five years.

(ii) With the legal profession, only members of the Law Society would be eligible to vote. As membership numbers barely eighty at the moment, election would not be difficult with each member voting individually.

(iii) With the other professions, referred to in paragraph (d) above (that is, medical, engineering, etc.) the total number would be similar to the number of lawyers and hence election would not be difficult with each member voting individually.

(iv) As for the sugar cane and copra planters, it will not be difficult to ascertain the persons eligible to register as a voter and hence they could register individually.

(v) Members of the House of Representatives would be grouped territorially, without regard to political affiliation. A suggested definition of areas is that all the members representing the constituencies in Vanua Levu and other outlying islands should elect one member and the members representing the constituencies in Viti Levu and other islands forming part of any constitutency in Viti Levu should elect two members. The latter "electorate" can be conveniently divided into two "constituencies" by existing constituency boundaries. The dividing line would run roughly from Raki Raki to Navua.[40]

---

40 Which will virtually divide Viti Levu from the N.N.E. to S.S.W.

There should be certain qualifications on the entitlement to vote in this indirect election and for membership of the Senate.

(i) No person should be allowed to register as a voter on more than one roll. For instance a person may be a member of a trade union and also a farmer with holdings of more than ten acres. It would be unfair to allow some persons more than one vote. If he qualifies for registration on more than one roll, then he must opt for one or the other.

(ii) Except in the case of election by the members of the House of Representatives, no person should be allowed to offer himself as a candidate for election unless he has been registered as a voter on the particular roll in respect of which he is offering himself as a candidate. If this requirement is not adopted the purpose of having indirect election may be defeated. The main reason for having at least a partial functional chamber is to have persons of diverse elements and various cross sections of the society represented in the Senate. Hence it would affect such a principle if any "outsider" could contest the elections.

(iii) No person should be allowed to be a candidate if within the three years immediately by preceding the Senate elections he had offered himself as a candidate for the House of Representatives. This provision is essential to avoid the impression that the Senate can be used as a reservoir for unsuccessful candidates. It is very important that the dignity and prestige of the Senate should be safeguarded from this sort of criticism if it is to discharge its functions effectively.

This disqualification of three years should also apply to prospective "candidates" for appointment by the Governor-General.

It is pertinent to note that under the existing Constitution, a member of the Senate is at liberty to retain his membership of the Senate while offering himself as a candidate for the House of Representatives.

In fact a few senators[41] did so offer themselves. Such a person is unable to perform the duties of a senator because he is apt to ponder to his constituency. The dignity and prestige of the Senate is affected by this provision. The impression is given that the Senate is a training ground or stepping stone for budding politicians who can always attempt to move from the Senate and if unsuccessful return to it. This is anomolous. Persons should be required to decide whether they have the capacity to serve in the Senate or not. If a senator wishes to be a candidate for the Hose of Representatives he should be required to resign from the Senate at least six months before filing his nomination as a candidate for the House of Representatives. This of course should apply not only to those senators who it is proposed would be indirectly elected but also to those who are appointed by the Governor-General.

Finally, as regards membership, it is sincerely hoped that senatorship will not be regarded as a way of rewarding a generous subscriber to party funds, or a successful businessman who has been or may be useful to some powerful interest favoured by one of the political parties, or party hack for political services or political complaisance. A successful Senate in Fiji will depend to a great extent on the choice of senators made by the Prime Minister and the Leader of the Opposition because under the proposals advanced and under the present Constitution they effectively have the power to nominate persons of their own choice. Although the Governor-General makes the appointment but the real power lies in the two persons advising him as to the appointment of a substantial number of members.

(4) The Powers and Functions of the Senate:

(a) The Present

The most important function of the Senate in its present form is to act as a watchdog in relation to the safeguards included in sections 67 and 68 of the Constitution.[42] Thus in 1973, the House of Representatives

---

41 E.g., M.T. Khan, (now a Minister) and H.C. Sharma in 1972; and Sarwan Singh in 1974 by-election.

42 See pp. 206 et seq., ante.

passed the Land Sales Tax Bill. When this measure was presented to the Senate, it was referred back to the House of Representatives for amendments inasmuch as the provisions affected native land and the prescribed "entrenched" procedure had not been followed.[43]

Apart from those matters which fall within the purview of sections 67 and 68 of the Constitution, the Senate has no powers to resist measures. Essentially, it is expected to revise all bills (except the financial ones) passed by the Lower House but has no direct power of veto. It can, however, delay the passage of a Bill for a period of up to six months, except for certain financial measures[44] and money Bills,[45] appropriation Bills[46] and Bills[47] certified by the Governor-General as urgent. Except for those measures to which sections 67 and 68 apply or those financial and other measures exempted as aforesaid, if any Bill is passed by the House of Representatives in two successive sessions (whether or not Parliament is dissolved between those sessions) and that Bill is sent to the Senate in each of those sessions at least one month before the end of the session, and the Senate rejects the measures in each of those sessions, that Bill, on its rejection for the second time by the Senate, shall be presented to the Governor-General for assent unless the House of Representatives resolves otherwise.[48] However, a period of at least six months must elapse between the date on which the Bill is passed by the House of Representatives in the first session and the date on which it is passed by that House in the second session.[49]

---

43 Parliamentary Debates (1973), 292.

44 Constitution, s.61.

45 Ibid., s.62.

46 Ibid., s.63.

47 Ibid., s.64.

48 Ibid., s.65(2). A bill is deemed to be rejected by the Senate if it is not passed by the Senate without amendment, or it is passed with any amendment which is not agreed to by the House of Representatives; Ibid., s.65(3). See Cormack v Cope [1974] 48 A.L.J.R. 319.

49 Constitution, s.65(2).

This delaying power provides the Senate with a good weapon without making the popularly elected House in any way subservient to the second chamber. The interposition of such a delay will enable the opinion of the nation to be adequately expressed upon the measures concerned. This is especially important as regards Bills which affect some fundamental principle or introduce new principles of legislation. Also a measure may be such that the opinion of the country appears to be almost equally divided. A delay gives all interested bodies or persons sufficient time to consider the proposed measure and make the necessary representations. After such representations and constructive criticisms, the House of Representatives may eventually decide to make certain changes. Even if no changes are made, at least the interposition of this delay will have given time for a critical analysis of important measures before they have been enacted as law.[50]

(b) Proposed Functions

(i) An important function that the Senate in Fiji can play is the staging of free and full discussion of large and important questions that arise at times when the House of Representatives may be so much occupied that it cannot find sufficient time for them.[51] The House of Representatives, preoccupied with legislation, will find itself with insufficient time for a full debate on many important international, economic and social issue. Further, party politics would dominate the debates in the Lower House where the fate of the Government and the Cabinet is determined by the debates and divisions. Party politics might restrain members from commenting as they would wish to. Restraint would be practised by politicians. However, in a Senate composed in the manner suggested, these difficulties would not be present. The Senators selected in the manner suggested would not be directly responsible to the electorate and each would be at greater liberty to investigate and probe into policies than would the members of the House of Representatives. In the Senate, divisions would not have the same significance as in the Lower House. Hence political questions would, more often than not, be judged with calmness and comparative freedom

---

50 Cf. Bryce Committee Report.

51 Cf. Ibid.

from prejudice or bias. It is conceded that party spirit cannot be completely excluded, but that spirit will certainly be moderated when Bills and important policies are debated in the Senate composed as proposed.

(ii) Irritation of Bills:

The powers of the Fiji Senate are not as wide as they are in some other countries. For instance it has no power to initiate legislation. It is a matter for regret that this power was not conferred on the Fiji Senate. But if the Senate had been constituted in the manner suggested party politics would not have been active and Billis initiated in the Senate would have been likely to receive objective and dispassionate treatment. Prior debate in Senate would result in a Bill being put into better considered shape before presentation to the House of Representatives.[52] It could be expected to have an easier passage through the Lower House. There does not seem to be any cogent or valid reason for this power not being given to the Senate.

The House of Representatives, and particularly the Government, might find it advantageous to have a measure introduced into and debated by the second chamber. It is always possible that some very useful legislation might originate from the Senate. Party politics being what they are, even a well thought one and useful Bill introduced by an Opposition member, will almost invariably be opposed by the government - unless of course it permits members a free vote. A Senate uncontrolled by political parties might easily initiate measures which find favour with the government.

At present the impression is created that the Senate is merely a rubber-stamp for the Lower House and that it is largely ineffective. It's revisionary functins including the power to delay bills, are seldom exercised or asserted. If the Senate were permitted to initiate legislation this would improve its usefulness and its public image.

---

52 Cf. Bryce Committee Report loc. cit.

(iii) Joint Select Committees:[53]

The House of Representatives in Fiji entrusts a great deal of important work to its select committees - either standing or ad hoc select committees. These committees prepare reports after careful deliberation and present them to the House. They are not expected to sit while the House is in session; there are very few "free" hours while Parliament is in session and their responsibilities impose a heavy strain on members. Because there are only fifty-two members in the House (including the Prime Minister and all the other Ministers), members may have to serve on more than one Committee. The work of some Committees requires substantial research and meticulous care in the preparation of their report. One example is the Sugar Select Committee. The dependence of the entire economy on the sugar industry makes the task of this Select Committee onerous and exacting. If joint select committees on which members of both Houses served were established, the members of the Senate could make a valuable contribution and members of the House of Representatives would be able to share their burdens. But this assumes that members of Senate have been chosen for their knowledge and experience in various walks of life. This would not necessarily be so as the Senate is at present constituted. Nonetheless even with the present composition of the Senate joint select committees could be of significant assistance.

The committee work of Parliament is of fundamental importance. The better it is done, the higher will be the esteem in which the legislature is held. The work of the select committee is increasing and at times it is quite complex. If a part of this responsibility could be transferred to the proposed Senate, it would increase the efficiency of the committees concerned because persons of special skill, training and qualification would be available to serve on them. Moreover, because each member would have fewer Committees to serve on, he could devote more time to other matters demanding his attention.

---

53 Such committees were discussed in the Report of the New Zealand Constitutional Committee at p.36. Substantial assistance has been derived from the Report.

Joint Select Committees are recommended for at least the following:

(a) Sugar.
(b) Land.
(c) Delegated Legislation.
(d) Public Petitions.

(a) Sugar:

Sugar is the most important commodity exported from Fiji and the industry is literally the backbone of the country. Much time and knowledge is required of the members of this committee. Research and field work are necessary. Members of the Senate chosen for their experience, knowledge and skill could make a valuable contribution. Needless to say, the Select Committee on sugar would not itself be making any policy but a report by a committee with members possessing knowledge and skill would be expected to carry much weight with the House of Representatives.

(b) Land:

Land is one of the most involved and highly controversial topics in Fiji. In fact it is the major problem in Fiji. It is also invariably a political issue.[54]

The Fijians have very strong constitutional safeguards in relation to their land. No law can be passed touching Fijian lands until and unless six out of eight senators appointed by the Governor-General on the advice of the Great Council of Chiefs approve of the Bill.[55] Hence, to discuss and attempt to alter laws pertaining to Fijian land without consulting the Great Council of Chiefs is to attempt the impossible.

---

54 See the Report of the Commission of Enquiry into the National Resources and Population Trends of the Colony of Fiji (1959), Council Paper No. 1 of 1960 (commonly known as the Burns Commission Report).

55 However, under the changes proposed by the author, it would be three out of five.

In Fiji about eighty-three per cent of the land is under the control and ownership of indigenous Fijians. Part of this land is leased to non-Fijians. As Indians form the majority of the population and most of the sugar cane and dairy farmers are Indians, the position is anomolous. It cannot be disputed that as a general rule the Fijians have the land and the Indians have the farming expertise. This has caused the land problem. The Indians obviously are in direct need of land which is controlled by the Fijians.

As has been seen Fijian land is not owned by individual Fijians but by the social units. Even such groups do not hold separate legal titles to the land.[56] All Native lands are vested in the Native Land Trust Board.[57] The Board has absolute responsibility for administering Native lands for the benefit of the Fijian owners.

The Native Land Trust Board is effectively controlled by the Council of Chiefs. The Board consists of[58] the Governor-General as President, the Minister responsible for Fijian affairs as Chairman, five Fijian members appointed by the Great Council of Chiefs, three Fijian members appointed by the Fijian Affairs Board from a list of nominees submitted to the Fijian Affairs Board by provincial councils, and not more than two members of any race,[59] appointed by the Governor-General.[60] The Fijian Affairs Board is in fact a body of

---

56 See p.14, ante. As to land tenure in Fiji and questions relating to land generally see Burns Commission Report and The Fijian People: Economic Problems and Prospects, a Report by Professor O.H.K. Spate; Council Paper No. 13 of 1959: Journal of the Legislative Council (1959).

57 Created by the Native Land Trust Ordinance, Chap. 115 of the Laws of Fiji; see pp. 14 et seq., ante.

58 Native Land Trust Ordinance, s.3.

59 It is interesting to note since the Native Land Trust Board came into existence in 1945 no Indian has been appointed to the Board. Europeans have been appointed besides the Fijians.

60 As to the history, composition and functions of the Council of Chiefs and Fijian Affairs Board see pp. 21 et seq., ante.

the Great Council of Chiefs. The Fijian Affairs Board and the Council of Chiefs are both created by the Fijian Affairs Ordinance.[61] Section 3 of this Ordinance provides:

> There shall be in respect of the Fijian people a Council called the Great Council of Chiefs which shall consist of such number of appointed, elected and nominated persons as the Governor-General may by regulation prescribed.

Section 5(1) of the said Ordinance provides:

> There shall be of and for the Council [of Chiefs] a Board called the Fijian Affairs Board which shall consist of such appointed and elected persons as the Minister may by regulation prescribe.

Hence it is clear that the Fijian Affairs Board is in close association with the Council of Chiefs. The Board is "of and for the Council" of Chiefs. Accordingly it can be asserted that the Council of Chiefs' views in the Senate on matters pertaining to land would be the views of Native Land Trust Board in particular and the native Fijians in general.

Past experience has shown that when land issues are raised in Parliament, emotion tinted with racialism prevails. The whole question is surrounded by suspicion and marred by emotional outbursts. As a result land issues cannot fruitfully be debated in open Parliament. For instance, on 26 June 1974, there was a very unfortunate scene created in the House of Representatives when the Opposition Whip, Mr K.C. Ramrakha, called for the abolition of the Native Land Trust Board during a debate which involved the land issue. In reply the Minister for Fijian Affairs and Local Government,[62] Ratu William Toganivalu, said he would refuse to issue leases of Fijian land to Indians, or renew them, as long as he

---

61 Chap. 100 of the Laws of Fiji; ss.4 and 5.

62 He is also the chairman of the Native Land Trust Board and also a member of the Council of Chiefs.

remained in office.[63] This incident, particularly the remarks of the Minister, created a stir and caused uncertainty amongst the Indians. Indian farmers have been in constant fear of losing their land on the expiration of their leases. This remains a major problem.[64] The uncertainty and concern created by the Minister's speech was only slightly reduced by the remarks of the Deputy Prime Minister who said that the Minister's views were not those of the government, and the Minister made those remarks as chairman of the Native Land Trust Board and not as a Cabinet Minister.[65] However, such an explanation did not satisfy or allay the fears of the Indians in Fiji.[66] This is quite understandable. Ratu William Tongaivalu was sitting and speaking in Parliament in his capacity as a Minister and not as the chairman of the Native Land Trust Board. How his remarks made in Parliament could be attributed to him as chairman of the Board is difficult to see.

For present purposes, it is pertinent to note that what the Minister said regarding non-renewal of leases is absolutely within the powers of the Native Land Trust Board subject to the statutory protection for two renewals of the minimum period of ten years each, granted by the Agricultural (Landlord and Tenant) Ordinance[67] in respect of agricultural holdings. Beyond that protection, the Board has absolute discretion whether to grant lease or renew a lease of any Native land.[68] As has been seen the protection of Native land is entrenched by the Constitution.[69]

Accordingly, it is submitted that since the Constitution of Fiji gives the Council of Chiefs an effective, in fact a paramount, say in land matters, dialogue and discussions are surer ways of achieving results than confrontations in the Parliament. It is submitted a joint Select

---

63 Parliamentary Debates (1974).

64 See the Burns Commission Report and the Spate Report.

65 Fiji Times, 30 June 1974.

66 Fiji Times, 1, 2, & 3 July 1974.

67 Ch. 242 of the Laws of Fiji.

68 83% of all lands in Fiji is Native land.

69 See pp.206 et seq., ante.

Committee on land could provide a workable forum for a frank discussion without making the issue a political football. Perhaps it would be advisable to include at least three of the Council of Chiefs' nominees in the Senate as members of the Select Committee.

In the Select Committee members would be able to speak freely and uncompromisingly without the fear of being answerable to their various constituencies. The discussions would not take place in the same atmosphere as debates in the House of Representatives. At least there is bound to be more objectivity in discussions and the exchange of views because the Committee as a whole will be presenting its report. The composition should be such that the Council of Chiefs in adequately represented. It will provide a good opportunity for dialogue between the representatives of the Prime Minister, the Leader of the Opposition and the Council of Chiefs. Any report presented by this Committee will have the advantage of being prepared after divergent views have been presented without them becoming political issues, at least while the discussions take place. Also the Committee will be able to carry out field work objectively as the Committee as a whole will be responsible for the report.

(c) Delegated Legislation:[70]

Statutory regulations and other orders made pursuant to statutory authority are becoming increasingly significant. Parliament of course is not directly responsible but since these regulations or orders are made on the authority of Parliament, it is imperative that Parliament keep a check on them. They are not the result of debate or public discussion, but may nonetheless often be far-reaching in their scope and consequences. Hence, it is submitted, there ought to be a select committee of both Houses to examine regulations, bylaws, orders and any other type of delegated legislation referred to it. If six members of either House of Parliament request that any such delegated legislation be referred to the Committee for consideration, the matter ought to be

---

70 Cf. Report of the New Zealand Constitutional Reform Committee, 35.

considered by the Committee. The purpose of the examination would be to consider the specific matters raised in respect of the delegated legislation in question and also to report when necessary on the merits of the legislation and matters incidental thereto.

(d) Public Petitions:[71]

A petition to Parliament has been the traditional manner, albeit almost as a last resort, of drawing attention to grievances. This may be seen against its historical background in England where Parliament is the highest Court in the land. This cannot be said of the Parliament in Fiji; nevertheless petitions are commonly presented. Such petitions must be treated in a judicial manner by Parliament which is seen as a forum of public opinion and representation. Hence a full and proper enquiry ought to be given to all petitions unless they are frivolous. A strong Joint Select Committee could perform a more useful service here. Members would be expected to be persons of experience with special qualifications. The committee would be able to devote more time to the examination of reports and testimony and would be in a strong position to submit a sound and well reasoned decision. Political considerations would assume less importance, at least to members of the Senate. The House and Cabinet could be expected to consider carefully the report of such a strong Committee.

(e) Composition of the Joint Select Committee:[72]

For members of the Senate to play a successful and effective role in the Joint Select Committees proposed, it is imperative that the majority of the members in these select committees be from the Senate. The House of Representatives must be sufficiently represented so that the House can be made fully conversant with the facts and opinions upon which the Joint Select Committee had based its findings. Except for the Select Committee on land, membership of each of the Committees should total eight, three from the House of Representatives and five from the Senate. Appointments should be made by the respective Houses. At least

---

71 Ibid., 34.

72 Ibid., 36.

one of the appointees must be an Opposition member and of the Senators at least one must be fromamongst those appointed on the advice of the Leader of the Opposition and not more than three to be of those appointed on the advice of the Prime Minister. The Chairman must be an appointee of the House of Representatives as the reports of the Committee will be presented to the House of Representatives by the chairman. Three members of that House having sat on the Committee will be in a position to give the House such information as might be required to enable it to arrive at its own conclusions.

As far as the Joint Select Committee on land is concerned, membership should be eleven, eight of these members being appointed in the same way as the members of the other Committees. The additonal three members should be appointed from among the Senators appointed on the advice of the Great Council of Chiefs. The reason for such additional members has been discussed.

Because the Senate does not sit for such long hours and on so many days as does the House of Representatives, the Senators serving on these proposed important committees would be able to do the work more throughly and to the benefit of Parliament and the country at large. Since most of the members of the proposed Committees will be Senators, most of the members of the House of Representatives will be spared more time to devote to other businesses of the House.

E. Conclusion

It is apparent that Fiji should retain its second chamber. Its composition presents problems.

> But to devise a good Second Chamber, to discover for it a basis which shall be at once intelligible and differentiating; to give it powers of revision without powers of control; to make it amenable to permanent public sentiment and yet independent of transient public opinion; to erect a bulwark against revolution without interposing a barrier to reform - this is a task which has tried the ingenuity of constitution - makers from time immemorial.[73]

---

73 Marriott, op. cit., 238.

The present Senate fulfils some of these functions but under the present Constitution it has only two major functions. The first is to safeguard the special interests specified in sections 67 and 68 of the Constitution (which includes constitutional amendments). The second is to carry out the detailed revision of "over hasty and ill-considered legislation". So far the Senate in Fiji has not really discharged these functions, having in all but a few cases[74] acted more or less as a rubber stamp for the House of Representatives.

The observations of R.H. Hickling in relation to the Senate of Malaya are equally apposite for Fiji; he said[75] that "the Senate is valuable not for what it does, but for what it could do". The Senate is at present able to resist any legislation falling within sections 67 and 68 of the Constitution. In all other cases it has only a power of delay. If the functions, powers and duties of the Senate were expanded to include the additional duties outlined in this chapter, the Senate would make a more significant contribution to the government of Fiji. Control to the success of the proposal is securing as members of the Senate persons who possess the special qualifications to carry out the functions proposed. The Senate would then be able to make concrete and tangible contributions to the parliamentary process and the nation at large. It would be a powerful body but would still remain the less important chamber. The "will" of the people would not be nullified by a chamber which was not popularly elected. The House of Representatives would still remain the interpeter of the popular will with the Senate a major element in the governmental process. Constituted in the manner suggested the Senate would become an effective deliberative as well as revisionary body.

---

74 E.g. Land Sales Tax Bill, discussed on p.657, ante.

75 "The First Five Years of the Federation of Malaya Constitution," (1962) 4 Malaya L. Rev. 183, 190.

CHAPTER XVIII

THE SPEAKER CRISIS

A. Background to the Crisis

The Speaker Crisis arose out of the introduction of anti-strike legislation by the Fiji Government early in 1973. The Trades Disputes Bill was a response to and an attempted solution of the wild-cat strikes which had started in 1972 and were causing serious harm to the national economy. The Bill conferred wider powers on the Minister of Labour to ban strikes, to extend the class of "essential industries", and to subject union leaders to penalties of imprisonment and/or fines for inciting illegal strikes. It was strongly opposed by the Fiji Trades Union Congress and the Parliamentary Opposition Party. Indeed the latter's stated intention was "to use every constitutional means in our power to oppose this bill". [1]

The Bill was introduced in the House of Representatives by the Minister of Labour on 3 April, 1973. The proposed first reading had, however, to be postponed to the next day when the Speaker[2] sustained the objection of the Opposition Whip that it had not been distributed to the members of the House early enough to comply with Standing Orders.

The next day the Bill got its first reading. The Government intended that the Bill should also receive its second reading on the same day. This was again objected to by the Opposition Whip on the ground that the Standing Orders required that it be set down for second reading at some future date. The Speaker accordingly ruled

---

1 As was announced by the Opposition Whip, Mr K. C. Ramrakha; Fiji Parl. Deb. (1973), 244.

2 Mr R. D. Patel.

the second reading on 4 April out of order. After the House had dealt with the remaining items on the order paper, the Opposition Whip declared that, as a member of the House Business Committee, he had the right to move and did so move that the House adjourn sine die because it had no more business to attend to. The Deputy Prime Minister's [3] amendment to the motion that the House adjourn only until 9.30 a.m. the following day was carried by twenty eight votes to twelve. The Speaker then pointed out that in view of his earlier ruling that the second reading of the Trades Disputes Bill could not take place that day, the House was sitting with no business on the order paper. In reply to the Attorney-General's contention that there were two messages from the Senate (as well as the second reading of the Trades Disputes Bill) still pending, the Speaker stated that those messages had not proceeded to the stage of inclusion in the order paper and therefore could not be discussed by the House. Amidst protests from the Government members, the Speaker declared the House adjourned sine die.

The Opposition felt it had "won the first round". [4] However, that evening there was a Government announcement over the radio that the House would meet at 9 a.m. on the next day, 5 April. It was immediately followed by the Opposition's statement that it would not be present at the sitting as the Speaker had adjourned the House sine die. On the Speaker's instructions, the chamber had been locked and the staff of the House told not to attend on 5 April. The use of the chamber and/or the removal of the Mace from his office was expressly prohibited by the Speaker.

---

3 Ratu Sir Edward Cakobau, the Prime Minister Ratu Sir K.K.T. Mara was not present.

4 In the words of an Opposition Member, Mr Apisai Tora, Pacific Islands Monthly (May, 1973) Vol. 44 No. 5, 5.

Nonetheless at 9.20 a.m. the next day members of the governing party assembled in the House with the Deputy Speaker[5] in the Chair. The "meeting" was adjourned at 9.23 a.m., resumed at 11 a.m. and readjourned at 11.03 a.m. At 2.35 p.m. it was again resumed but despite the passing of a motion that Her Majesty's Mace be brought into the House and that the staff be directed to take up their places, the "meeting" proceeded without the Speaker, Mace or Opposition. With the leave of the Deputy Speaker the Attorney-General successfully moved that the proceedings of the House of that day be valid and effectual notwithstanding that the Mace was not in place and that the previous day's "minutes" be amended from the original "Mr Speaker adjourned the House sine die" to "Notwithstanding that the substantive motion was lost, the Speaker purported to adjourn the House sine die and left the Chamber. The House rose immediately afterwards." The "minutes" as amended were then confirmed and the House adjourned to 9.30 a.m. the next day. In the meantime the Speaker announced outside the House that the "meeting" of 5 April was a nullity. He called an "emergency meeting" of the House for Friday, 6 April.

Both parties attended at the House on that day and an impasse developed. The Speaker refused to accept the legality of the previous day's proceedings whilst the Leader of the House declined to move a confirmation of the "minutes" of 4 April on the ground that it had already been confirmed on 5 April. In an attempt to break the procedural deadlock there were various adjournments for private talks but to no avail. The Speaker then adjourned the House until Monday, 9 April.

---

5 Mr Vijay R. Singh.

The stalemate continued unbroken on Monday so the House was again adjourned to Tuesday, 10 April. On Tuesday afternoon, an "arrangement" was reached between the parties. The Speaker took the Chair and the "minutes" of the 4 and 5 April were approved. After announcing that he had been embarrassed by accusations of partiality in the House and found it impossible to remain in the chair "under a cloud of suspicion",[6] he withdrew from the House for a week. During the Speaker's absence the Trades Disputes Bill was quietly passed by both Houses of Parliament with only minor amendments. A motion of no confidence in the Speaker was introduced by the Government and was passed by the House of Representatives but the two-thirds majority necessary[7] for his removal from office was not secured.

B. The Court Proceedings:

Matters did not remain within the walls of the House. Supreme Court proceedings were brought by Mr James Madhavan, an Opposition member of the House of Representatives, against the Attorney-General, three ministers of the Crown who were members of the House of Representatives and the Deputy Speaker.[8] The plaintiff initially claimed four declarations but at the hearing of the defendants' application to strike out the writ, he persisted with only two declarations, viz.,

(a) A declaration that the actions of the Deputy-Speaker in sitting

---

6 Fiji Parl. Deb. (1973), 284.

7 Constitution, s 36(3)(d).

8 Madhavan v Falvey (unreported) civil suit No. 119 of 1973 (Supreme Court) and civil appeal No. 34 of 1973 (Court of Appeal).

as Deputy Speaker in the circumstances, and in direct defiance of the Speaker's ruling and directions were ultra vires the Constitution of Fiji, and contrary to all conventions of Parliamentary democracy;

(b) A declaration that the actions of the defendants in physically taking over the House, commandeering the staff of the Speaker, taking over the Mace of Her Majesty the Queen, and purporting to stage a sitting of the House with the Deputy Speaker in the Chair were unconstitutional, illegal and a nullity, and constituted a breach of the Constitution of Fiji and of the doctrine of separation of powers, and conventions of Parliamentary democracy.

In support of his claims the plaintiff alleged in the writ that:

5. On the 4 day of April 1973 at the end of a duly convened sitting of the House of Representatives the ... Speaker adjourned the House sine die under the provisions of the Standing Orders of the said House.

6. The defendants objected to the said adjournment and notwithstanding the direct ruling of the Speaker and his subsequent assertions that the House had been adjourned sine die, the defendants, and each of them, against the consent, and express directions of the Speaker physically took over the House of Representatives, commandeered the staff of the Speaker in the House of Representatives, and physically removed Her Majesty's mace of Parliament from the Chamber of the Speaker and purported to stage a sitting of the House of Representatives on two occasions on the said 5th day of April, 1973 with the fifth defendant purporting to sit as Deputy Speaker of the House.

7. The fifth defendant in purporting to sit as Deputy-Speaker defied the Speaker, and sat against his express directions at a time when the Speaker was neither absent nor unable to sit, and the fifth defendant contravened all conventions of Parliamentary democracy, and the Constitution of Fiji.

8. The plaintiff says that the said sittings of the House were a nullity, and a grave contempt of Parliament, and Her Majesty the Queen, and such demonstration that "might was right", and usurpation of the Parliamentary Chamber by the defendants were a direct contravention of the Constitution of Fiji, and breached the doctrine of separation of powers, and were contrary to all conventions, and traditions of Parliamentary democracy.

The defendants issued a summons to have the writ set aside on the grounds:

(a) that the Supreme Court had no jurisdiction to deal with the issue or to grant the relief sought; and

(b) that the endorsement on the writ and the issue thereof was an abuse of the process of the Court.

The defendants contended that the plaintiff's allegations did not give rise to an action maintainable in Court because:

(1) section 54 of the Constitution[9] empowered the House to regulate the conduct of its own proceedings;

(2) the allegations related exclusively to matters connected with

---

9 Section 54 provides:

(1) Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may make rules for that purpose, including in particular the orderly conduct of its own proceedings.
(2) Each House of Parliament may act notwithstanding any vacancy in its membership (including in the case of the House of Representatives any vacancy not filled when the House first meets after a general election) and the presence or participation of any person not entitled to be present at or participate in the proceedings of the House shall not invalidate those proceedings.
(3) Parliament may, for the purpose of the orderly and effective discharge of the business of the two Houses, make provision for the powers, privileges and immunities of those Houses and the committees and members thereof.

the conduct of proceedings in the House; and

(3) such proceedings were not subject to judicial control.

The plaintiff contended, on the other hand, that the real issue was whether or not the defendants had contravened the Constitution. The plaintiff said that the Deputy Speaker in purporting to preside at a time when the Speaker was neither absent nor unable to sit, acted in direct contravention of section 57 (1) of the Constitution which provides:

> The Speaker or in his absence the Deputy Speaker or in their absence a member of the House of Representatives (not being a Minister or Assistant Minister) elected by the House for the sitting shall preside at any sitting of the House.

It was contended that this provision clearly laid down that the Deputy Speaker could only preside in the absence of the Speaker and at the relevant time the Speaker was not absent. In support of the contention that the defendants had acted in breach of the Constitution, attention was drawn to the definitions of "session", "sitting" and "the Speaker" in section 127 of the Constitution and also to section 69 (5) thereof and Order 25 (1) of the Standing Orders of the House made under section 54 (1) of the Constitution.

Section 127 provides:

> In this Constitution, unless the context otherwise requires -
>
> "session" means, in relation to Parliament, the sittings of Parliament commencing when it first meets after this Constitution comes into force or after the prorogation or dissolution of Parliament at any time and terminating when Parliament is prorogued or is dissolved without having been prorogued;

> "sitting" means, in relation to a House of Parliament, a period during which the house is sitting continuously without adjournment, and includes any period during which the House is in committee;

Section 69 (5) provides:

> Subject to the provisions of subsection (1) of this section, the sittings of each House of Parliament shall be held at such time and place as that House may, by its rules of procedure or otherwise, determine.

Standing Order 25 (1) provides:

> Meetings:
>
> Meetings of the House other than the first meeting of any session shall begin on such day and at such hour as the Speaker may determine after consultation with the Prime Minister. Written notice thereof shall be given by the Clerk to Members at least fourteen clear days before the day of the meeting but in cases of emergency the Speaker may after consultation with the Prime Minister dispense with such notice and in that event the longest possible notice shall be given.

The plaintiff claimed that each purported sitting of the House with the Deputy Speaker presiding was not a sitting within the meaning of the word as defined in section 127 and was therefore a nullity. It was submitted that, having regard to the definition of "the Speaker" in section 127, after the Speaker adjourned the House on 4 April 1973 only he, and not a person deputising for him, could, after consultation with the Prime Minister, determine the day and hour when the House would sit again.

The plaintiff further contended that the defendants acted in breach of the doctrine of the separation of powers, inasmuch

as the defendants, being members of the executive, had by their actions attempted to exercise powers which, on the proper construction of the Constitution with its threefold divisions of powers, could only be exercised by the Legislature.

The learned Chief Justice, Sir John Nimmo, in delivering the judgement of the Supreme Court pointed out at the outset that;[10]

> It is not alleged by the plaintiff that the defendants, with or without the support of either members of the House, passed any enactments or did anything else that would affect the rights of persons outside the House.

The learned Chief Justice then held that the conduct of which the plaintiff complained of occured in and formed part of the proceedings of the House. Further, it was held, that[11] "the Constitution did not give the courts the power to adjudicate upon matters which relate to proceedings within the House which do not affect the rights of persons outside the House".

As for the contention that the defendants acted in breach of the doctrine of the separation of powers, the learned Chief Justice held that the defendants were not in breach of the doctrine in "the slightest degree". He said:[12]

> Assuming that all or some of the defendants form part of the executive it is obvious that on these occasions they were not the executive of Fiji nor did they do anything that would suggest that they acted as if they were. Whatever they did in connection with the purported

---

10 Unreported judgement of the Supreme Court (1973), 6.

11 Ibid., 11.

12 Idem.

> sittings of the House it is not alleged that they passed or attempted to pass any enactments or did anything else which would amount to an exercise or attempted exercise of the law-making functions of the Legislature ....(T)he plaintiff's allegations, which I am assuming to be true for the purposes of the proceedings before me, do not support to the slightest degree the claim that the defendants have breached the doctrine of separation of powers.

Consequently, the writ was set aside.

The plaintiff appealed against the Supreme Court order. The Court of Appeal held that [13] "so far as local legislation does not provide, the privileges of the English Parliament (of which the sole right of regulating its internal proceedings is one) would attach to the newly created Houses in Fiji."

The court further said:[14]

> The Parliamentary Powers and Privileges Ordinance (Cap. 3) provides for some powers and privileges but does not purport to be an exclusive list and is concerned largely with procedural matters and offences by individuals. It is not in our opinion intended by implication to abolish those established privileges of the House itself, the power to punish for contempt and the exclusive right to control its own internal proceedings.

Also,[15]

> the privilege of the House to control its own internal proceedings ... has, in our opinion, become part of the law of Fiji unless the Constitution otherwise

---

13 Unreported judgement of the Court of Appeal (1973), 8.

14 Ibid., 9.

15 Ibid., 10.

requires.

The Court of Appeal held that section 57 (1) of the Constitution was, at least in part, merely a procedural section despite its incorporation in the Constitution. The Court of Appeal adopted the words of the learned Chief Justice when he said:[16]

> Article 57 (1), like Order 10 of the Standing Orders of the House, recognizes the need for someone to preside over the House when it is sitting and makes provision to ensure that there will be someone to perform that function. In my opinion it was inserted in the Constitution to meet that need and for no other reason. It concerns a matter of procedure and I can find nothing whatever in it to even suggest that its intention is to remove or diminish the power of a House of Parliament in this Dominion to manage and control its own internal proceedings .... Assuming that the (Deputy Speaker) acted contrary to the provisions of the Article and the Order it is for the House alone to pass upon his conduct so long as the rights of persons outside the House are not affected.

The Court of Appeal held that the basic requirements of section 57(1) that the Speaker, Deputy Speaker or an elected member shall preside in the House are constitutional matters and a contravention of such requirements may be challengeable by a person so qualified under section 97 of the Constitution. Nevertheless "the decision which of the persons mentioned shall preside is essentially one of internal procedure, which must necessarily be resorted to by the House in deciding the question".[17]

---

16 Unreported judgement of the Supreme Court (1973), 10.

17 Unreported judgement of the Court of Appeal (1973), 13.

C. Analysis and Constitutional Implications of the Crisis and the Judicial Decision Thereon:

(1) General

It is submitted that it is rather unfortunate that both the Supreme Court and the Court of Appeal made pronouncements which would not have been necessary if the matter had been decided on the basis of locus standi, as required by section 97 of the Constitution which provides:

> (I)f any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then ... that person may apply to the Supreme Court for a declaration and for relief under this section.
>
> (2) The Supreme Court ... shall not make a declaration ... unless it is satisfied that the interests of the person by whom the application under the preceding subsection is made or, in the case of other proceedings before the Court, a party to those proceedings, are being or are likely to be affected.

The common law and principles applicable to declaratory judgements apart,[18] this section is quite specific that the party making the application for a declaration of infringement of any constitutional provision must show (and of course prove) that his interests

---

18 See I. Zamir, The Declaratory Judgement (1952) et seq. and Guaranty Trust Co. of New York v Hannay [1915] 2K. B. 536 where it was held that the court has power to make a declaration, whether there is a cause of action or not, at the instance of a party interested in the subject-matter.

are being or are likely to be affected by such contravention.

In other jurisdictions too the Courts have acted on the principle that in constitutional cases only a person whose rights have been affected by a statute may challenge its constitutional validity, and that person's rights must be directly or immediately threatened. The general rule in the United States of America was expressed thus:[19]

> The party who invokes the power must be able to show not only that the Statute is invalid, but that he has sustained, or is immediately in danger of sustaining, some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

The question of what is sufficient interest was considered in the Australian case of Crouch v The Commonwealth,[20] where it was held that an allegation that the plaintiff's business was hampered by the necessity of obtaining permits under an allegedly invalid law was sufficient to sustain the action.

In United Public Workers of America et. al v Mitchell[21] certain employees of the Executive Branch of the Federal Govern-

---

19 Massachusetts v Mellon 262 U.S. 447, 488 (1923). As to the position in India, see Dwarkadas v Sholapur Spinning Co. (1954) S.C.A. 132; A.I.R. (1954) S.C. 119.

20 (1948) 77 C.L.R. 339.

21 330 U.S. 75 (1947).

ment applied for an injunction against members of the Civil Service Commission prohibiting them from enforcing the provisions of a statute which forbade such employees from taking any active part in political management or political campaigns. There was also a claim for a declaration of the unconstitutionality of those provisions. There was no allegation that they had violated the statute or that they were threatened with any disciplinary action, but only that they desired to engage in acts of political management and in political campaigns. It was held by the majority of the Supreme Court that a desire of government employees to engage in the political activities forbidden by the controversial statute did not constitute a sufficient basis for a declaratory suit to determine the constitutionality of the Act. The Court held that the power of courts to pass upon the constitutionality of Acts of Congress arises only when the interests of litigants require the use of such judicial authority for their protection against actual interference. The Court said:[22]

> It would not accord with judicial responsibility to adjudge, in a matter involving constitutionality, ... except when definite rights appear upon the one side and definite prejudicial interferences upon the other .... Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories.

This question as to what is sufficient interest was considered by the Federal Supreme Court of Nigeria in Olawoyin v Attorney-General of Northern Region.[23] Part VIII of Northern

---

22 Ibid., 90.

23 (1961) All Nigerian Law Reports 269. The Nigerian provision of "interest" was substantially the same as s. 97 of the Fiji Constitution.

Region, Children's and Young Persons Law 1958, prohibited political activities by juveniles and prescribed penalties for juveniles and others who were parties to certain specified offences. The plaintiff brought proceedings for a declaration that the part of the law in question was unconstitutional in that it contravened the provisions of the Constitution of 1954 protecting fundamental rights relating to private and family life, freedom of conscience and freedom of expression. By consent, pleadings were dispensed with. In the trial court it was stated that the plaintiff's evidence would be that he was the father of children whom he wished to educate politically. As a result there was a danger of his rights being infringed if the law were enforced even though no action of any kind had been taken against him under the law. The High Court dismissed the case upon the ground that no right of the plaintiff was alleged to have been infringed and that it would be contrary to principle to make a declaration in vacuo. The Federal Supreme Court held that only a person who is in imminent danger of coming into conflict with a law, or whose normal business or other activities have been directly interfered with by or under the law has sufficient interest to sustain a claim that the law is unconstitutional. The plaintiff in the instant case failed to allege or establish any such interest.

The above cases deal with circumstances where actual statutes were the subject of attack. However, it is submitted, the principles of locus standi discussed are of equal application in other cases where any infringement of the Constitution is concerned.

It is submitted that the principles applied in the above decisions would have also been applicable in Madhavan v Falvey.[24]

---

24 Supra.

Section 97 of the Constitution specifies that the applicant (plaintiff) must show that his interests are being or are likely to be affected by such contraventions of the Constitution. Let it be assumed for present purposes, that the actions of the Deputy Speaker were in breach of section 57 (1) of the Constitution. How this contravention could affect or be likely to affect the interests of a member of the House (other than the Speaker) or an ordinary citizen of Fiji is, with respect, very difficult, if not impossible, to see.

The Court of Appeal, didadvent to this subject and it did find that the restrictions of section 97 "would apply to the plaintiff in the present case, but he had made no claim in either the writ or the statement of claim of such prejudice or likely prejudice to his interests".[25] Yet the Court of Appeal did not dismiss the appeal on this most relevant ground. This aspect of the matter affected the very jurisdiction of the court in granting the declaration sought.

It is regrettable that neither the Supreme Court nor the defendants adverted to this vital matter. The jurisdiction of the Court depended on the presence or otherwise of the plaintiff's "interest". The proviso to section 97 (2) of the Constitution expressly prohibits the Supreme Court from making a declaration unless it is satisfied that the interests of the applicant or a party to the proceedings are being or are likely to be affected.

---

25 Unreported judgement of the Court of Appeal, (1973), 14.

(2) Avoidance of Constitutional Issues:

In the United States of America it is well established [26] that the Court will avoid considering constitutional questions if there are other avenues open to dispose of the case. The principle has been stated:[27]

> When the validity of an act of the congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.

The American Courts have taken this view in determining questions relating to the interpretation of statutes without answering constitutional questions. In United States v Congress of Industrial Organization [28] the statute in question prohibited expenditures by labour organizations in connection with federal elections. The defendants were charged with having expended Union funds on the publication of a periodical which endorsed a particular candidate for the Congress. The trial judge dismissed the indictment on the ground that the statute was unconstitutional for violations of the First Amendment. The Supreme Court affirmed the order of

---

26 See notes, "Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions," (1953) 53 Colum, L. Rev. 633; Notes, "Avoidance of Constitutional Issues in Civil Rights Cases," (1948) 48 Colum. L. Rev. 427.

27 Crowell v Benson, 285 U.S. 22, 62 (1931). The classic formulation of this principle is found in the pronouncements of Mr Justice Brandeis in Ashwander v Tennessee Valley Authority 297 U.S. 288, 346 (1936).

28 335 U.S. 106 (1948).

dismissal on the ground that the circulation of the periodical was confined to the members of the Union to which the defendants belonged and that the statute did not make the distribution of the periodical within the membership of a labour organization an offence, so that a decision on the constitutional issue was not necessary. In fact Mr Justice Frankfurter seems to have thrown an open invitation to more frequent use of these methods suggested when he said, in admonishing counsel,[29]

> Again, the defendants did not urge, below, as is ordinarily the way of defendants, a construction of the statute which would afford them the rights they claim - but would secure those rights not by declaring an Act of Congress unconstitutional but by an appropriate restriction of its scope. On its own motion, this Court now gives a construction to the statute which takes the conduct for which the defendants were indicted out of the scope of the statute without bringing the Court into conflict with Congress ... I cannot escape the conclusion that in natural eagerness to elicit from this Court a decision at the earliest possible moment, each side was at least unwittingly the ally of the other in bringing before this Court far-reaching questions of constitutionality under circumstances which all the best teachings of this Court admonish us not to entertain.

The application of this principle of avoiding constitutional issues seems to have been based on two policy considerations.[30] First, there is the policy of judicial self-restraint whereby the Courts respect the judgement of the legislature in deciding upon the constitutionality of legislation. Secondly, there is a strong desirability of well considered constitutional decisions.

---

29 Ibid., 128.

30 Notes "Avoidance of Constitutional Issues in Civil Rights Cases," loc. cit., 429.

> [There is] the fear that hasty opinions given in advance of the necessity for decision or in broader terms than required will tend to be ill-considered ones which, as precedents, will hinder and embarrass the court in subsequent cases. [31]

It was for this reason that in the United States the Supreme Court has generally limited the scope of the constitutional issue to that required by the facts of the particular case.

> To predetermine, even in the limited field,.. the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions. The possibility of other uses of the coercive power of license, if it is here upheld, is not before us. [32]

Accordingly, it is regarded as desirable for parties in litigation involving constitutional matters to limit the scope of their issues.[33]

It is submitted that the question of avoidance of constitutional questions ought to apply not only in the actual interpretation and application of statutes but ought also to be of general and broad application in constitutional cases generally. In United States v Rumely[34] the House of Representatives adopted a resolution authorizing a committee to investigate all lobbying activities intended to influence legislation. A witness refused to disclose to

---

31 Ibid., 430.

32 United States v Appalachian Electric Power Co. 311 U.S 377, 423 (1940).

33 United States v Congress of Industrial Organization 334 U.S. 106 (1948).

34 345 U.S. 41 (1952).

the committee the names of those who made bulk purchases of certain books for further distribution. He was convicted for contempt of the committee. The Supreme Court ordered a dismissal of the charge. The majority of five preferred to rest their decision on the ground that the investigation was limited to narrower issues than that embarked upon by the committee in relation to the witness. However, the majority did hold that:[35]

> Patently, the Court's duty to avoid a constitutional issue, if possible, applies not merely to legislation technically speaking but also to congressional action by way of resolution .... Indeed, this duty of not needlessly projecting delicate issues for judicial pronouncement is even more applicable to resolutions than to formal legislation.

Hence in any case involving a constitutional issue, it must first be seen whether the case can be disposed of without deciding on the constitutional issue. A decision on the constitutional issue ought to be a matter of last resort both because of its importance inasmuch as matters affecting the Constitution are very serious and because of the need wherever possible to avoid conflicts with the legislature.

Hence, it is submitted, in Madhavan v Falvey,[36] the Courts in Fiji could have very conveniently and satisfactorily disposed of the case by dismissing the claim on the ground that the plaintiff did not have sufficient "interest" within the meaning of section 97 of the Constitution. This would certainly have avoided the need

---

35 Ibid., 45.

36 Supra.

for the Court's embarking on the constitutional issues. There is no doubt that declaring an act of the legislature unconstitutional is "the gravest and most delicate duty the Court can be called upon to perform".[37] The Fiji Courts not only ruled on the constitutional issues but, with respect, made pronouncements which were irrelevant and were otherwise open to criticism. This could easily have been avoided if the Courts had adopted the principle of United States' constitutional jurisprudence that in constitutional cases the courts must first ascertain whether the case can possibly be decided in such a way that the constitutional issue can be avoided. The Madhavan case could have been decided without reference to the constitutional issues involved.

(3) Judicial Reasoning

It is submitted that the actual reasons for dismissing the action by the Supreme Court and the Court of Appeal are open to criticism. The learned Chief Justice said (and the Court of Appeal agreed) that:[38]

> Assuming that the defendant acted contrary to the provisions of the Article 57 (1) and the Order it is for the House alone to pass upon his conduct so long as the rights of persons outside the House are not affected.

Section 57 (1) of the Constitution seems to have been treated as a

---

37 Notes, "Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions," loc. cit., 634.

38 Unreported judgement of the Supreme Court (1973), 10.

non-justiciable provision. The learned Chief Justice said:[39]

> Article 57 (1), like Order 10 of the Standing Orders of the House, recognizes the need for someone to preside over the House .... It concerns a matter of procedure and I can find nothing whatever in it to even suggest that its intention is to remove or diminish the power of a House of Parliament ... to manage and control its own internal proceedings.

Section 2 of the Constitution declares its supremacy over any other law. It states:

> This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

The Speaker of the House cannot be removed from office, inter alia, unless the House passes a resolution supported by the votes of not less than two-thirds of all the members thereof requiring his removal from office.[40] Also, it has been seen that under the Constitution,[41] it is expressly provided that the Speaker "shall" preside at any sitting of the House. It is only if the Speaker is absent that the Deputy Speaker can preside.[42]

---

39 Idem.

40 Constitution, s. 36 (3) (d).

41 Ibid., s. 57 (1).

42 However, it is pertinent to point out that in the actual incident culminating in "the Speaker Crises" whether the Speaker was "absent" within the meaning of s. 57 (1) of the Constitution when he was sitting in his own chamber is not the subject of the present enquiry. The present discussion is confined to the issues involved and matters raised by the Courts.

Section 54 (1) of the Constitution provides,

> Subject to the provisions of this Constitution each House of Parliament may regulate its own procedure and may make rules for that purpose, including in particular the orderly conduct of its own proceedings. (emphasis added).

This section gives general powers to the House of Representatives (and the Senate) to regulate its own procedure but these powers must be exercised subject to the other provisions of the Constitution, as the opening words of the section specifically state. Section 57 (1) of the Constitution expressly provides that the Speaker or in his absence the Deputy Speaker shall preside at any sitting of the House. Therefore, it is submitted, the House cannot, without an amendment of the Constitution, regulate its own procedure or make rules for the conduct of its proceedings under section 54 which derogate from the provisions of section 57 (1).

> A legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its powers to make law.[43]

If this principle is applied to the proceedings of the Fiji House of Representatives it is clear that, if the Speaker is not "absent", the Deputy Speaker can not preside and the House can not make provision for the Deputy Speaker presiding.[44] This being the case, it is impossible to accept, with respect, the correctness

---

43 Bribery Commissioner v Ranasinghe [1965] A.C. 172, 197.

44 See n. 42, ante.

of the statement of the learned Chief Justice:[45]

> I can find nothing whatever in [s. 57 (1)] to even suggest that its intention is to remove or diminish the power of a House of Parliament in this Dominion to manage and control its own internal proceedings.

It is submitted that section 57 (1) was intended to "diminish" the power of the House to control its own internal proceedings at least in relation to the person who shall preside.

Accordingly, it is submitted, with respect, that both the Supreme Court and the Court of Appeal misconceived the justiciability of the breach of the provisions of section 57 (1) of the Constitution. In the instant case an ordinary member of the House had sought a declaration under section 97 but it is clear that his interests were not being and were not likely to be affected. But if the Speaker himself had applied for a declaration, the courts could not have decided that his interests were not affected. Nor could the courts have left the matter for the House itself to resolve. The Speaker would have satisfied the requirements of section 97 of the Constitution inasmuch as his interests would obviously have been affected. At the least his prestige and his privileges as the presiding officer of the House would have been involved. He would therefore have been a person whose interests were or were likely to have been affected within the meaning of section 97 of the Constitution. On the reasoning of the learned Chief Justice, that it was for the House to resolve the matter, the Speaker of the House can effectively be removed from office without the two-thirds majority required by the Constitution.

---

45 Unreported judgement of the Supreme Court, 10.

This is obviously unacceptable. In a paradoxical statement, the Court of Appeal did hold that the basic requirements of section 57 (1) [46]

> that the Speaker, Deputy Speaker or elected Member shall preside are constitutional and if material business is transacted at a sitting of the House not so presided over it may be a contravention of the Constitution challengeable (by a person qualified) under Article 97. But the decision which of the persons mentioned shall preside is essentially one of internal procedure, which must necessarily be resorted to by the House in deciding the question. In that sphere the privilege mentioned continues to operate and the Courts may not inquire whether the House has interpreted the law correctly or not .... the rights of persons outside the House being unaffected, it was for the House alone to pass upon the conduct of the Deputy Speaker in assuming the Chair in the circumstances alleged.

The opening portion of the statement that a contravention of section 57 (1) is challengeable by a person qualified under section 97, with respect, is supported by the Constitution. But the latter part cannot be supported either by the Constitution or by logic. How in one breath can it be said that a matter is challengeable under section 97 and in the next breath say that it is a matter to be resolved by the House itself. If the question of the presiding officer is a matter for resolution by the House one might ask what was the necessity of not only providing in the Constitution for the presiding officer to be the Speaker and in his absence the Deputy Speaker but also protecting their tenure by providing that they may not be removed from office without a two-thirds majority.

---

46 Unreported judgement of the Court of Appeal, 13.

On the reasoning of the Court of Appeal the Constitution could equally well have left the question of who shall preside in the House to the general powers of the House to regulate its own procedure.

The decisions in Madhavan v Falvey demonstrate how dangerous it can be for the Courts to follow too slavishly English precedents and common law rules without paying regard to the particular circumstances of Fiji. Fiji with its written Constitution is in this respect in a similar position to Western Nigeria of which Viscount Radcliffe stated:[47]

> (I)t must be remembered that, as Lord Bryce once said, the British Constitution 'works by a body of understandings which no writer can formulate'; whereas the Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and while it may be useful on occasions to draw on British practice or doctrine ... it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

It has been seen[48] that the lex et consuetudo parliamenti apply exclusively to the Houses of Lords and Commons in the United Kingdom and do not apply to the supreme legislature of a Dominion by reason of the introduction of the common law there.

---

47 Adegbenro v Akintola [1963] A.C. 614, 631. (Emphasis added).

48 Pp. 292 et seq., ante.

Although Commonwealth legislatures resemble the English Parliament in many respects the legislatures of colonies and self-governing states of the Commonwealth have no inherent constitutional right to the privileges belonging to the United Kingdom Parliament. They are entitled only to such privileges as are reasonably necessary for them to carry out their legislative functions.[49] In particular Dominion legislatures, such as that of Fiji, have no inherent powers to commit for contempt. This has been well established by Privy Council and other decisions.[50] Yet surprisingly, the Court of Appeal in Madhavan v Falvey observed that "the power to punish for contempt" is an "established privilege" of the House of Parliament in Fiji. When there is no statutory provision dealing with such a privilege, how the Court of Appeal could make such an observation in view of clear judicial authorities to the contrary is difficult to explain. The only explanation that may be given is that the Court of Appeal seems to have slavishly followed writings and precedents pertaining to the English Parliament without considering whether they necessarily applied to Fiji.[51]

Be that as it may, the Courts should have heeded Viscount Radcliffe's warning and considered the relevance of English precedents and writings to Fiji where the Constitution must be taken as the primary and fundamental source of authority. English precedents and principles can be taken only as general guides.

---

49 Kielly v Carson (1842) 4 Moo. P.C. 63, and see generally pp. 292 et seq., ante.

50 See pp. 292 et seq., ante.

51 For a fuller treatment of this subject see Ch. VIII, ante.

Ultimately, it must be the Constitution which prevails.

D. Conclusion

This crisis and the judicial decisions which followed serve as a grave warning for the future of the Fiji Constitution. The actions of the government members, in physically taking over the control of the legislative chamber, on 5 April leave them open to criticism. On that occasion might was right and the government of the day was able to proceed despite the Standing Orders of the House of Representatives, and, in view of the decision in Madhavan v Falvey, in spite of certain provisions in the Constitution. Rule 41 (1) of the Standing Orders of the House of Representatives provides:

> The Speaker shall be responsible for the observance of the rules of order in the House and in committee of the whole House. His decision on a point of order shall not be open to appeal and shall not be considered by the House except upon a substantive motion made after notice.

It is not contended for a moment that the Speaker acted correctly in adjourning the House sine die in the face of a clear vote to the contrary. However, his ruling should have been challenged by a substantive motion made under the Standing Orders and not by occupying the chamber. The actions of the governing party appear to be undemocratic and leave an impression of intimidation and a threat to the office of the Speaker. In regard to the Speaker of British Parliament Sir Ivor Jennings declared;[52]

---

52 Parliament (2nd ed., 1957), 63.

> The House takes great care to maintain and even to enhance his prestige.

And further:[53]

> (T)he ordinary interpretation of the rules and customs of the House is the function of the Speaker himself, and he will allow no debate or criticism of his decision except on a formal motion.

It is sincerely to be hoped that the actions of the government members during the crisis will be taken as an exceptional isolated incident best buried in the ashes of history. Parliamentarians ought to be the champions of law and order and ought to endeavour to enhance the rule of law. Their conduct should not be seen as contributing to anarchy and disorder.

The courts in Fiji, judged by the reasoning adopted in the judgements in Madhavan v Falvey[54] have slavishly copied the English rule without sufficient regard for the nature and express provisions of the Fiji Constitution. In copying the English rule the courts have abdicated all too easily their responsibilities under the Constitution. The courts should be encouraged to eschew a narrow positivist analysis in favour of a more constructive view of their function and thereby make a reality of their guardianship of the Constitution. Because the judiciary was intended to be the guardians of the Constitution judges must be more assertive. No matter how strong or powerful a government is, it will not be able to breach the Constitution if the judiciary

---

53 Ibid., 69.

54 Supra.

lives up to expectations by exercising its powers of judicial review and thereby demonstrating the supremacy of the Constitution in Fiji.

Judicial self-restraint in relation to the "proceedings in Parliament" as shown in the United Kingdom cannot be automatically followed in Fiji. The history and traditions of Parliament in the United Kingdom make it unique within the Commonwealth.[55] Fiji's written Constitution and the doctrine of judicial review make the position different in Fiji. The Courts have the responsibility for giving the provisions of the Constitution a construction conducive to the attainment of its intended objects. Judicial self-restraint should not be shown where the Constitution clearly cast the judiciary in an active role of keeping a check on the exercise of the powers and functions of the executive and legislature. This must be done fearlessly by asserting the independence of the judiciary from the other branches of government. It can do this by declaring its responsibility for interpreting the written Constitution and its intention not to be bound by English precedents and traditions.

It must of course be conceded that one case does not furnish evidence from which one can deduce the existence of a pattern of behaviour in constitutional cases. Nevertheless, it does indicate the need for care. The reasoning adopted gives the impression that the judges must make the Constitution a dynamic living institution, to be construed according to the needs of the people of Fiji. If this is done the warning sounded by Viscount Radcliffe in Adegbenro v Akintola[56] will not go unheeded.

---

55 See pp.159 et seq., ante.

56 [1963] A.C. 614, 631; see n. 47 p.696, ante.

CHAPTER XIX

CONCLUDING OBSERVATIONS

A. The Communal Question:

Prior to cession on 10 October 1874 there was a period of agitation and chaos with perennial tribal wars and conflicts. After 1874 the significant events were no longer the result of battles but of institutional progressions. The country experienced in turn the various phases of constitutional development culminating in independence on 10 October 1970.

It is apparent that throughout Fijian constitutional history racial consciousness played an influential, if not, decisive, role. At the turn of the century the Europeans successfully demanded the franchise and specifially requested that neither the Fijians nor the Indians be given any representation. In 1905, however, the British Government allowed Fijian representation in the form of two nominees of the Governor. It was not until 1929 that the Indians were first enfranchised.

Soon after 1929 the Indians, relying on the Salisbury Despatch,[1] sought the establishment of a common roll. This sprang not from any desire to dominate the other races or to bresk links with the Crown but from a wish for equality with the other races, particularly the Europeans. This aim was achieved by the 1937 Letters Patent and the Indian community was, accordingly, content.

In the 1960's the Federation Party, which was pre-dominantly Indian, renewed the demand for a common roll on the basis that an inequitable situation had arisen under colonial rule in that representation of the three major races in the Legislative Council had become quite disproportionate to their actual numbers.[2] It was

---

1 The Secretary of State for India, Public (Emigration) No. 39, Despatch to India of 24 March 1875, para 18, which read thus:

> Above all things, we must confidently expect as an indisputable condition of the proposed arrangement, that the Colonial laws and their administration will be such that Indian settlers who have completed the terms of service to which they agreed as the return for the expense of bringing them to the Colonies, will be in all respects free men, with privileges no while inferior to those of any other class of Her Majesty's subjects resident in the Colonies.

2 See Council Debates (1965), 630-642 and (1967), 612-614.

also argued that political integration would be best achieved by a common roll system with "one man, one vote, one value".

From the outset, both the Europeans and the Fijians opposed the introduction of a common roll. The main objection was seemingly the fear of Indian predominance. In the mid-sixties, the Alliance Party's[3] policy was to oppose the immediate introduction of a common electoral roll but to support it in principle as a long term objective. There was no definition of 'long term'.

In Fiji, as in any multiracial society, it is only natural that each race should fear the infringement of its rights or action prejudicial to its interests by government action especially if one race is the ascendant. From the inception of British colonial rule racial consciousness was fostered strongly and it became a fact of life in Fiji. Racial stresses permeated all aspects of education, economics, politics and society. Europeans, Fijians and Indians saw themselves as distinct races with negligible political or social intercourse. Until recently, little thought, if any, was given to the training of political leaders in racial tolerance and multiracialism. It was not until the mid-sixties that political parties traversing racial boundaries came into existence.

Although a generalisation, it is nevertheless true that despite the achievement of statehood, there is little positive feeling of nation hood amongst all the races living in Fiji. The only common factor seems to be their residence in the same country. There is significant diversity and little integration in race, culture and economic interests and other attributes usually associated with the existence of a nation. The indigenous Fijians regard themselves as the true heirs and owners of the country, forced by circumstances to make some concessions to the "aliens" but never relinquishing the conviction that Fiji is properly theirs. Then there are the Indians, Europeans and Chinese who were born in Fiji or have otherwise put down roots there, they too regard Fiji as their homeland. In fact in the case of a great majority of the Indians and some Europeans and Chinese, three or four generations of their ancestors were born and lived in Fiji. These non Fijians are still

---

3 It is the party presently in power.

predominant in the industries, trade, business and the professions in the country.

There is however little gain and perhaps positive harm in lamenting the past from which Fiji has emerged as a state. It must now be accepted that Fiji will always have a plural society. The common aim must be the building of Fiji as a multiracial nation in which the identity and culture of each race can be retained.

B. Towards a New Electoral Equilibrium[4]

Constitutions are the product of political forces and reflect, or can be changed to reflect, the feeling, capabilities and aspirations of a particular society at a particular time. A constitution cannot be divorced from the society it governs.

> Representative institutions of the world have reached no final or definite form. Conditions vary from country to country and from continent to continent, exposing each, in their own sphere, special and particular limitations in the parliamentary system. The history of modern constitutional development is one continuous record of attempts to adjust accepted parliamentary practice to the realistic requirements of a social and economic progress. It is no longer enough to criticise a constitution on the debatable grounds of political theory without explaining the peculiarities of its environment.[5]

A constitution is not just a document in solemn form. It is a living framework for the government of a people exhibiting a sufficient

---

4 A Royal Commission has been appointed under s.67(4) of the Constitution to make recommendation as to the most appropriate method of electing members of the House of Representatives. The members of the Commission are Professor Harry Street (Chairman), Sir William Hart and Professor Brian Keith-Lucas. The Commission heard submissions from the interested parties in Fiji in August 1975 and has returned to England to prepare the report which is expected to be presented to the Governor-General before the end of 1975: Fiji Times, 5 September 1975.

5 Donoughmore Report of 1928 on Ceylon: Cmd. 3131 (1928), 19.

degree of cohesion. A satisfactory system of government is not the product of a particular constitutional solution but a reflection of the capacity of the people of the country and their political responsibility. As Lord Bryce aptly observed, a people must not be given institutions for which it is unripe in the simple faith that the tool will give skill to the workman's hand.[6]

No constitution can function in any country where people are at odds with one another. "There must be some binding elements of unity in outlook which constitutes the real constitution."[7] National unity is a fundamental requirement for the viability of any constitution. There must be a feeling of common belonging and love for the political community. For most of the newly independent countries today, Fiji included, the basic problem is the creation of this sense of national unity.

Under normal circumstances a common electoral roll with one man, one vote and one value would cut across ethnographic boundaries. Its adoption in Fiji at this stage would, however, not be realistic owing to the absence of a national outlook as opposed to a racial one. Before such a system of national elections can be introduced the peoples of Fiji must learn to think of the country as a whole rather than in terms of racial advantage. The transition can only be gradual and must evolve rather than be imposed by sudden radical changes; the process necessarily involves changes in attitudes. The law is no complete panacea for the ills of society; but where individuals have freedom of choice, the law can influence though not determine their choice.

Attitudes can be effectively conditioned by an electoral system which discourages appeals on communal or racial lines. Any change must not be radical and yet be a progressive step towards the ultimate goal of political integration. Accordingly it is submitted that all

---

6 Modern Democracies (1921) Vol. II, 562-563.

7 C.J. Friedrich, Constitutional Government and Democracy (revised, 1949) 164.

communal rolls should be abolished. In their place there ought to be one national roll with a certain number of seats in the House of Representatives reserved for each communal group as in the current system.[8]

1. The Number of Seats

At present the House of Representatives comprises twenty-two Indian seats, twenty-two Fijian seats and eight "others". From the viewpoint of population strengths[9] the number accorded these "others" is seemingly inequitable but in view of their signficant investment in and control of the major industries, any reduction in their representation directly proportionate to their numbers would also be unfair. The number of seats allocated to the Indians and the Fijians is justifiable in that the two races form the bulk of the population and are approximately equal in number.

It is submitted that the Indian and Fijian representation ought to remain at twenty-two each but that of the "others" ought to be reduced from eight to five. The repeated claim that the Fijians should have the greatest representation does not seem to take into account that Fijian interests are more than adequately safeguarded by the entrenched provisions of the Constitution[10] pertaining to their land, customs and culture.

2. National Appeal

If all the voters are on one electoral roll as suggested, the country will have two sets of constituencies - one for the Fijians and Indians and one for the "others". There would be no differences in constituency boundaries of the Indian and Fijian members since their numbers would be the same.

Any incentive to appeal to ethnic sentiments would be kept to a minimum if the communal rolls were abolished since electoral policies

---

8 As to the meaning of "communal" and "national" rolls, see p.114 , ante.

9 See p.3, ante, for the population figures of the last census in 1966 and the estimated figures of 1974.

10 Ss.67 and 68.

would necessarily have to attract voters of all races in order to succeed at the polls. Racialism and communalism would be relegated to insignificance, thus allowing the interests of the country and the people as a whole to come to the fore.

The demographic pattern would result in a preponderance of Fijians or Indians, as the case may be, in a few constituencies but such imbalances would be exceptional. Any dangers of these centres becoming bastions of communalism are more apparent than real. Political parties would place a premium on non-racial appeals by their candidates as the parties' success in other constituencies would otherwise be adversely affected. In any case where this inherent check failed and extremist candidates were elected, their numbers would be so few as to be inconsequential.

It is submitted that this suggestion of a national electoral roll would be a good workable compromise between the proponents of the immediate introduction of a common electoral roll with one man, one vote and one value and those who accept the eventual advent of a common roll but only as a long-term objective. More importantly, this interim arrangement would foster, albeit subconsciously, the development of a national outlook amongst the peoples of Fiji.

3. Referendum

The two major constitutional changes that were made in Fiji in 1966 and 1970 were brought about by the British Government after consultations with the country's political leaders. The deliberative sessions both in Fiji and at the constitutional conferences in London were *in camera*. The people as a whole were given little opportunity, if any, to make a constructive contribution or have any direct say in such vital matters.

In contrast, Western Samoa's progress towards independence included a constitutional convention in 1954 which was followed by the appointment in 1959 of a working committee to draft a Constitution. In 1960 there was a second constitutional convention whose one hundred and seventy-five members included persons who were not members of the Assembly but who nevertheless represented a wide range of interests.

Then in May 1961 a plebiscite was held in which the adult population were asked two questions:

(a) whether it agreed with the Constitution and

(b) whether it agreed that the country should become independent on the basis of that Constitution.

The response was an overwhelming "yes" to both questions. It could therefore be said that it was a Constitution of the people and by the people.

Admittedly the present Fiji Constitution is a fait accompli and we can only look to the future. It is accordingly suggested that any major constitutional change to come, whether in the electoral system or any other sphere, must be referred to the people. The best way to achieve this is to have a referendum on the issue.

> The (constitutional) change should not far outstrip nor should it lag behind public opinion. It should if possible, anticipate by a small margin public demand.[11]

The referendum should be held before the matter is finally debated in Parliament. If the issue involves changes to the electoral system, the views of each community (Fijian, Indian and 'others') should be recorded separately to ensure a proper analysis. Although Parliament will not be bound by the plebiscite, the results would provide a sound measure of public opinion.

C. The Land Issue[12]

Land is possibly Fiji's most pressing problem. At least eighty-three per cent of all land in Fiji is under the direct control of Fijians. The great majority of the Indians depend upon land for their livelihood. Hence the land question has inevitably become a communal and constitutional issue. This was one of the matters which

---

11 Mr J.N. Falvey, the present Attorney-General of Fiji, Council Debates (1959), 101.

12 See p.10, ante.

the Fijian leaders have been very cautious about when discussing or agreeing to any constitutional change. As has been seen, the Fijians enjoy entrenched constitutional safeguards in relation to their land, customs, culture and way of life.[13] Unless the Council of Chiefs agrees to a measure affecting Fijian land, no legislation can be passed. Accordingly, it is submitted, it is imperative for any solution to the land question to be found that the leaders generally, and the Indian leaders in particular, must approach the Council of Chiefs in a neutral non political context. An amicable solution is the only answer. It is hoped that the leaders would refrain as far as possible from using the land issue as a political football and recognise the futility of doing so.

There is no doubt that there are thousands of acres of land lying idle or not put to full economic use. The country's economy is suffering tragically. The Fijian land owning units are losing a great deal by not utilising their lands or allowing others to do so. Also those lands which have only a short unexpired term for their lease are being exploited to the maximum by the tenants who are mostly Indians. Because these tenants have no security of tenure, they are understandably not interested in the future fertility of the soil. They see the whole matter on a short term basis.

The whole country is the loser. A solution cannot be found in Parliament or on the political platform. The answer lies in good sense and mutual understanding between the Council of Chiefs representing the Fijians, and Indian leaders representing the Indians.

D. The Judiciary

Since the Constitution is very new to the country, the judiciary has a very important role to play. The judiciary owes the government and the people of Fiji a duty to develop the Constitution and make it effective. There is much to be learnt by the people and the

---

13 Constitution, ss.67 and 68. Ironically the National Federation Party, which was predominantly an Indian Party at the time of the 1970 Constitutional Conference, seems to have created the special position of the Fijian people; see p.644, ante.

government alike from the decisions of the courts. If the courts administer justice as expected, both the people and the government would be more conscious of their functional and civic responsibilities. Although the government may in the ultimate have its way through legislative measures to nullify an inconvenient and embarrassing decision, the judiciary must nevertheless assert and demonstrate that they are the guardians of the Constitution and of the liberties of individuals. By upholding the sanctity of the Constitution the judiciary can serve the interests of the governors and the governed alike. It can be asserted with confidence that the linchpin of the Fiji Constitution is and can only be the judiciary.

The area of the Constitution in which the courts will have most opportunity for developing the law is in the field of fundamental human rights under chapter II of the Constitution. These rights are not absolute. Most of the provisions establishing these rights make them subject to certain derogation clauses. A striking example in where derogations are "reasonably justifiable in the democratic society" in the interest of defence, public safety, public order, public morality or public health. This area is a completely new one for the courts in Fiji. It will be one of many areas which will involve the courts in political questions, thereby providing a testing ground for the indispensible qualities of strength and independence in the judiciary. The courts are the citadel of the liberty of man.

The entrenched provisions and the fundamental human rights guaranteed by the Constitution can only be safeguarded by the courts. In a world where pressures have led to guided democracy and to despotism, the courts have traditionally pointed to dangers and protected individuals from arbitrary governmental acts. The courts in Fiji will have to consider the structure and character of the Fiji society in applying rules pertaining to fundamental rights. In providing safeguards for individual liberty the courts should not necessarily transfer traditional concepts of English law. The courts will have to think anew about the structure and character of Fiji society.

The warning of Lord Lugard may be apposite:[14]

> Institutions and methods in order to command success and promote the happiness and welfare of the people, must be deep-rooted in their tradition and prejudices ... a slavish adherence to any particular type however successful it may have proved elsewhere, may, if unadapted to local environment, be as ill suited and as foreign to its conceptions as direct British rule would be.

The Constitution is a permanent and living document which the judiciary must adapt to the needs and problems of an ever evolving, if not ever changing society. The difficulty in amending the Constitution must represent a standing temptation to the courts to make their own contribution and to discover powers, immunities, instrumentalities and ancillary authority which may not always easily be found in the Constitution. In discharging its function of judicial review of legislation, the court forms

> a deliberate check upon democracy through an organ of government not subject to popular will. [But] the judges of the Supreme Court are, in a sense, the embodiment of the reason of the body politic empowered to act as the guardians and final interpreters of the fundamental laws, by the original and supreme will of the people which created them.[15]

Not only in the field of fundamental rights but in other matters also, the courts will have a creative role to play. For instance, what principles of interpretation will the courts follow and develop? Will the courts shift from the emphasis of judicial precedents to a position of pragmaticism?

The political society existing in Fiji is a dynamic and progressive one. It is hoped that the courts will not close their eyes to the realities of life and will not adhere to a legalistic

---

14 The Dual Mandate in British Tropical Africa (1922), 211.

15 E. Cahn (editor), Supreme Court and Supreme Law (1954), 81.

approach to matters which require urgent settlement. The courts must administer justice, particularly in the constitutional field, irrespective of the fact that their decisions may be embarrassing to politicians. The courts in Fiji must be careful not to get the reputation of the Nigerian courts of whom it was stated that[16] "in Nigeria the courts seldom ruled against the government and never in election cases." The Courts must be guided by the words of the Constitution and not by English conventional rules.

It is very important that the courts should jealously guard against any attempt to oust judicial review of legislative or executive measures. The courts must tear any facade behind which the legislature and the executive may take refuge to erode slowly the fabric of the Fiji Constitution. Balewa v Doherty[17] provides a striking example.

The Constitution of Fiji is barely five years old. In Fiji the judges and the lawyers alike have been principally bred in the English tradition and jurisprudence of the sovereignty of Parliament. But, as has been seen, in Fiji the written constitution is supreme. Hence the judges have the unenviable but vital task of adapting to the new order and reject the English tradition where judicial review of legislation is unheard of. The duty of the judiciary to infuse the spirit of constitutionalism in the country has been aptly summed up by Henry J. Abraham thus:[18]

> Nonetheless, the Supreme Court ... must play its role as educator and arbiter - it must remain true to its function as teacher in an eternal national constitutional seminar. No other branch can fill that role. It acts, in the words of one commentator, 'as the instrument of national moral values that have not been able to find other governmental expression.' It defines values and proclaims principles, and - as our 'sober second thought' is the natural forum in our society for the individual and for the small group. Thus it is the greatest institutional safeguard we possess .... [It is] our national conscience as well as our institutional common sense.

---

16 C. Palley, "Rethinking the Judicial Role" (1969) 1 Zambia L. Journal 1, 4.

17 [1963] 1 W.L.R. 949. See p.270, ante.

18 H.J. Abraham, The Judiciary (2nd. ed., 1969), 117.

D. The Westminster Model

Democracy in Fiji is essentially modern British parliamentarism applied to various social circumstances. Fiji has the Westminster model constitutional system with two Houses of Parliament and where the head of state is not the effective head of government. The effective head of government is the Prime Minister presiding in a Cabinet composed of Ministers over whose appointment and removal he has a substantial measure of control. The government is parliamentary as Ministers must be members of the legislature; and the Ministers are collectively and individually responsible to a freely elected House of Representatives. Despite the adoption of the Westminster model and section 1 of the Constitution which states, "Fiji shall be a sovereign democratic state", there is only limited democracy in the country. The elected representatives of the people cannot pass any legislation they wish even if all (and nt merely a majority) of the elected member of the House of Representatives agree. Legislation pertaining to Fijian land, customs and customary rights must secure, inter alia, the approval of six of the eight members of the Senate appointed on the advice of the Great Council of Chiefs. If all the 52 members of the House of Representatives and 19 of the members of the Senate agree to a measure affecting Fijian land, custom or customary rights and the three dissentors in the Senate are nominees of the Council of Chiefs, the measure cannot be adopted.

It has also been seen that the Governor-General has an effective power of veto. A measure cannot become law until it has been assented to by the Governor-General who has the constitutional right to refuse assent. It is submitted that such wide powers ought not to be reposed in one person with the silent hope that they will not be exercised. The English convention seems to have been slavishly incorporated in the Fiji Constitution. It is contended that safeguards ought to be provided in the event of a refusal of assent by the Governor-General. It is submitted that if a measure which is not assented to by the Governor-General is again passed by the two Houses of Parliament by a two-thirds majority,[19] then the measure should become law if the assent is not forthcoming.

---

19 Of course otherwise complying with the entrenched provisions of the Constitution.

The exercise of other functions of the Governor-General under the Constitution should also be made subject to judicial review. If the constitutional powers are to be exercised in accordance with democratic principles, then the court, as final arbiter, must be given the powers to adjudicate upon and review all such matters. The Constitution seems to have incorporated certain other conventional rules of the British system which regrettably have not been made subject to judicial review. The actions of the elected legislature have been made subject to judicial review. There does not appear any cogent reason why the actions of an appointed officer should not also be subject to review. However, it must be made clear that although it has been recommended that the Governor-General should be deprived of some of his unchallengeable powers and authorities, it is not the writer's intention to suggest that the office should be abolished.

In the election of the House of Representatives, the Fiji Constitution has followed the English principle of having a general election of all the members of the House at one time. It is submitted that this system should be changed in Fiji. The practise should be the same as is followed in the nomination of the members of the Senate where eleven of the twenty-two members retire every three years.

At present the members of the House of Representatives are elected for a term of five years, the position in the United Kingdom. It is submitted that the term ought to be extended to six years with one third of the members retiring every two years. If we are to have an educated electorate, interest in politics should not be sporadic but continuous. There should be a parliamentary election in seventeen constituencies every second year. If we have about one third of the members retiring every two years the electors would have a better opportunity to make choices and decisions. They would have greater opportunities to appreciate exactly what the election is about.

Such a system as suggested would be more effective test for the propaganda of the political parties. The government and the opposition parties would have beeter opportunities to explain their respective programmes. The electorate would have better opportunities to understand the alternatives. The government party would have to be on its toes all the time. It would have to carry out a policy which it knew would be approved of by the electorate. There would be stronger chances of

"honest" governments. The Minister of Finance would be less in danger of being tempted to introduce vote-catching instead of "honest" budgets. The election promises would have to be geniune and meaningful. The fear of the government being toppled by the electorate in two years time would be a very strong check on the government. The government would not be able to feel that it is secure for five years and forget about the electorate.[20] As Emrys Hughes has said,[21]

> What we need is more alert and more progressively-minded Governments and a better educated and better informed electorate.

As far as the Senate is concerned, it is hoped that it is made a functional chamber rather than a place to reward party stalwarts. The ills and dangers of the present method of appointment to the Senate has been examined.[22] It is also hoped that the Senate will be made of greater use by having its members contribute more effectively and constructively than it is being done today. An instance is the use of joint select committees of both Houses of Parliament.

---

20 E. Hughes, Parliament and Mumbo-Jumbo (1966), Chap. 22.

21 Ibid., 193.

22 See pp.650, et seq., ante.

APPENDIX I

EXTRA-TERRITORIAL LEGISLATION

AND THE

STATUTE OF WESTMINSTER

The report of the 1929 Conference on the Operation of Dominion Legislation[1] which was approved by the Imperial Conference of 1930,[2] stated, in relation to legislation having extra-territorial effect;[3]

> The subject is full of obscurity and there is conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent. There are differences in Dominion Constitutions themselves which are reflected in legal opinion in those Dominions. The doctrine of limitation is the subject of no certain test applicable to all cases, and constitutional power over the same matter may depend on whether the subject is one of a civil remedy or of criminal jurisdiction. The practical inconvenience of the doctrine is by no means to be measured by the number of cases in which legislation has been held to be invalid or inoperative. It introduces a general uncertainty which can be illustrated by questions raised concerning fisheries, taxation, shipping, air navigation, marriage, criminal law, deportation, and the enforcement of laws against smuggling and unlawful immigration. The state of the law has compelled legislatures to resort to indirect methods of reaching conducts which in virtue of the doctrine, might lie beyond their direct power but which they deem it essential to control as part of their self-government. It would not seem to be possible in the present state of the authorities to come to definite conclusions regarding the competence of Dominion Parliaments to give their legislation extra-territorial operation; and, in any case, uncertainty as to the existence and extent of the doctrine renders it desirable that legislation should be passed by the Parliament of the United Kingdom making it clear that <u>this constitutional limitation does not exist</u>.

The uncertainty in the law had arisen from the decision of the <u>Privy Council in Macleod</u> v <u>Attorney General for New South Wales</u>.[4] It is submitted that this was the only semblance of authority[5] for the

---

1 Cmd. 3479 (1929).

2 Cmd. 3713 (1930) 18.

3 Cmd. 3479 (1929) paras. 38 and 39 (emphasis added).

4 [1891] A.C. 455.

5 There is of course the case of <u>R</u> v <u>Lander</u> [1919] 38 N.Z.L.R. 405. However, as far as <u>Lander</u> is concerned, the relevant facts were very similar to the case of <u>Macleod</u> which greatly influenced the majority of the New Zealand Court of Appeal, despite a very strong dissenting judgment of Stout C.J. As Edwards J. said at p.189: "In my opinion this case is governed by the decision of the Judicial Committee of the Privy Council in <u>Macleod</u> v <u>Attorney General for New South Wales</u>." Accordingly, it is submitted, that <u>Lander</u> stands or falls with <u>Macleod</u>.

theory that a Dominion Parliament could not make laws with regard to acts done beyond its borders. This decision calls for close examination.

Macleod was charged with and convicted of bigamy under a colonial statute of New South Wales which stated:

> Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.

The first marriage had taken place in New South Wales and the "bigamous marriage" in Missouri, United States of America, after a divorce, which the Colonial Court could not recognise. After conviction, Macleod appealed to the Privy Council. The Privy Council held that the words of the above statute must have been intended to apply to persons actually within the jurisdiction of the legislature and consequently the conviction was quashed.

It is submitted that Macleod's case turned on the construction of a statute. Thus Lord Halsbury L.C. after setting out the material terms of the section said,[6] "In the first place, it is necessary to construe the words 'whosoever' .... The next word which has to be construed is 'wheresoever'." His Lordship then continued:[7]

> Therefore, if their Lordships construe the statutes as it stands, and upon the bare words, any person, married to any other person, who marries a second time anywhere in the habitable globe, is amenable to the criminal jurisdiction of New South Wales, if he can be caught in that Colony. That seems to their Lordship to be an impossible construction of the statute.

His Lordship also placed reliance on the principles of construction affecting the principles of international law. Under the general rules of interpretation of statutes, there is a presumption against a violation of international law. Under the general presumption that the legislature does not intend to exceed its jurisdiction, every statute is interpreted, so far as its language permits, so as not to be inconsistent with the

---

6 [1891] A.C. 455, 456.

7 Ibid., 457 (emphasis added).

comity of nations or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language.[8] His Lordship stated:[9]

> [T]heir Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be ... indeed, inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general.

It is a well settled law, and it was so settled before the above decision of the Privy Council, that at least in a penal statute, general words will not be given an extra-territorial operation unless an intention to give such an operation to the statute appears expressly or by necessary implication. Thus all references in such statute to persons, acts, or things will prima facie be restricted to persons, acts and things within the territorial limits of the jurisdiction of the legislature.[10] This rule, it is submitted, is applicable to the Imperial Parliament and Colonial or Dominion Parliaments alike.[11] Thus in the Trial of Earl Russell[12] the legislation of the Imperial Parliament expressly provided, "whether the second marriage shall have taken place in England or Ireland or elsewhere."

The Privy Council in the Macleod case held, therefore, that "Whosoever being married" must be read as:[13]

> Whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.

---

8 Bloxham v Favre (1883) 9 P.D. 101, 103; per Sir James Hannen P.; see also P.B. Maxwell, The Interpretation of Statutes (12th ed., 1969) 183-186.

9 [1891] A.C. 455, 457.

10 Maxwell, op. cit., 173-175.

11 Idem.

12 [1901] A.C. 446.

13 [1891] A.C. 455, 457.

Thence in interpreting the words "Wheresoever" Lord Halsbury L.C. agreed that:[14]

> When it is remembered that in the Colony ... there are subordinate jurisdictions, some of them extending over the whole Colony, and some of them, with respect to certain classes of offences, confined within local limits of venue, it is intelligible that the 54th section may be intended to make the offence of bigamy justiciable all over the Colony, and that no limits of local venue are to be observed in administering the criminal law in that respect. 'Wheresoever', therefore, may be read 'Wheresoever in this Colony the offence is committed'.

It is submitted that the decision of the Privy Council is one based purely on statutory interpretation. After giving the substantive ruling as to the interpretation to be placed on the two vital words "whosoever" and "wheresoever" upon which the case really turned, Lord Halsbury added:[15]

> Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories, and the maxim ... 'Extra territorium jus dicenti impune non paretur', would be applicable to such a case.

Moreover, as his Lordship, stated:[16]

> All crime is local. The jursidction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jursidction.

---

14 Idem.

15 Ibid., 458.

16 Idem.

It is submitted that his Lordship equates the position of the Imperial Parliament with that of a Colonial legislature. It seems that the Privy Council felt the Imperial Parliament would have been under a similar disability to the Colonial legislature in matters relating to criminal law. The above passage, it is submitted, is limited to criminal law in as much as the passage begins specifically with the subject of criminal law and the whole judgment was concerned with this subject. His Lordship stated that except over British subjects, the Imperial Legislature had "no power whatever" over crimes committed overseas. It seems his Lordship saw this as a "well known and well considered limitation"[17] which was common to the Imperial Parliament and Colonial Legislature alike. Thus he concluded:[18]

> The more reasonable theory to adopt is that the language was used, subject to the well known and well considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

It is relevant to look at the English law at that time. At that time it seems to have been reasonably well settled that in criminal law unless the statute expressly provided otherwise crimes committed abroad was not triable in the United Kingdom. Thus it had been held in R v Dubruiel[19] (before the decision in Macleod), that an indictment for larceny in Guernsey was not triable in the United Kingdom. Consequently in relation to bigamy the corresponding English statute specifically provided that only British subjects could be convicted in England (or Ireland) of bigamous marriages contracted outside the Queen's domains.[20]

---

17 Ibid., 459.

18 Idem. (emphasis added).

19 (1861) 11 Cox C.C. 207; See also Cox v Army Council [1963] A.C. 48, 67, per Viscount Simonds, "Apart from those exceptional cases in which specific provision is made in regard to acts committed abroad, the whole body of the criminal law of England deals only with the acts committed in England." Debruiel, supra, was followed in R v Smith [1962] 2 Q.B. 317.

20 Thus after providing for the offence of bigamy the statute states:

> Provided that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of Her Majesty .... (Offences Against the Person Act, 24 and 25 Vict. c. 100, s.57). See also Trial of Earl Russel, supra.

Therefore, it is submitted, the Privy Council, in Macleod, when speaking of the limitations of the Imperial Parliament (and also Colonial Legislatures) must have had the above limitation in mind. It was on the basis of this accepted and well settled limitation on the administration of criminal justice that the concluding paragraphs[21] of the judgment of the Privy Council in Macleod's case must be seen.

In any event, it is submitted, the concluding paragraphs were not strictly necessary for the actual decision of the Macleod case. After giving the substantive and necessary ruling on the actual points in issue, the report continues "their Lordships [thought] it right to add that they [were] of the opinion" on the matters that follow. It is submitted that the passages that follow were in the nature of obiter dicta.[22]

Subsequent judicial history, it is submitted, supports the contention that colonial or Dominion legislatures were competent to enact extra-territorial legislation as long as the subject matter related to matters otherwise within the competence of the legislature. The most obvious test here was whether the legislation related to the peace, order and good government of the country concerned. Thus only two years after the decision in Macleod the question arose in Ashbury v Ellis[23] whether the New Zealand legislature was empowered by the Constitution Act 1852 to subject to the jurisdiction of New Zealand courts persons who were not physically present nor represented by an agent in New Zealand. The Judicial Committee held that the New Zealand legislature was competent to so legislate. Lord Hobhouse in delivering the judgment of the Judicial Committee stated:[24]

> [T]heir Lordships are clear that it is for the peace, order, and good government of New Zealand that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the Defendant.

---

21 See n. 15, p.720, ante.

22 See H.A. Smith, "Extra-Territorial Legislation", (1923) 1 Can. B. Rev. 338, 340-344.

23 [1893] A.C. 339. It is interesting to note that Macleod was cited in argument.

24 Ibid., 344.

His Lordship further stated:[25]

> For trying the validity of the New Zealand laws it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand.

In Attorney-General for Canada v Cain and Gilhula,[26] the question in issue was whether the Alien Labour Acts of 1897 and 1901, passed by the Canadian Parliament, were ultra vires the Dominion Parliament. Section 6 of the 1896 Act authorised the Attorney-General to cause an undesirable alien to be taken into custody and returned to the country whence he came. It also authorised Canadian officials to use physical force beyond the frontier in carrying out the removal. The Court held that the statute was intra vires although the Canadian officials had to exercise extra-territorial constraint. The Privy Council upheld the statute on the broad ground that the power of expulsion and deportation was an essential part of the power to control immigration. Lord Atkinson in delivering the judgment of the Privy Council stated:[27]

> If, therefore, power to expel aliens who had entered Canada against the laws of the Dominion was by this statute given to the Government of the Dominion, as their Lordships think it was, it necessarily follows that the statute has also given them powers to impose that extra-territorial constraint which is necessary to enable them to expel those aliens from their borders to the same extent as the Imperial Government could itself have imposed the constraint for a similar purpose had the statute never been passed.

In New Zealand, the case In the Matter of Awards Affecting the Wellington Cooks' and Stewards' Union, the Australian Federated Seamen's Union, and the New Zealand Federated Seamen's Union[28] turned on the

---

25 Idem.

26 [1906] A.C. 542.

27 Ibid., 547, (emphasis added). Macleod was referred to in the judgment; Ibid., 545.

28 (1906-1907) 9 G.L.R. 214. See also Semple v O'Donovan (1917) 19 G.L.R. 137, per Stout C.J. at 140, Denniston J. at 141, Cooper J. at 143; Chapman J. at 145. See also Farey v Burvett (1916) 21 C.L.R. 433 and Sickerdick v Ashton (1918) 25 C.L.R. 506.

issue of the jurisdiction of the Court of Arbitration over the owners of vessels in respect of acts done outside the New Zealand limits. After referring to section 53 of the Constitution Act 1852, Sir Robert Stout C.J. stated:[29]

> The power is given in the widest terms to deal with all New Zealand interests. It is evident that for every act done in New Zealand the New Zealand Legislature can legislate, whether the act be done by a subject of the Crown or note. But the question is .... Can the Legislature of New Zealand deal with what may be termed New Zealand subjects while outside the territory of New Zealand? .... If our Parliament and our Courts cannot control the act of New Zealand subjects which are done outside our territorial limits, then can the peace, order and good government of New Zealand be secured? I do not think so .... In England the jurisdiction over subjects, wherever they may be, enables the Courts to deal with such cases; but if the Legislature of New Zealand has not the power to do so, our peace, order and good government might be seriously impaired.

It was held that since the legislation, inter-alia, came within the peace, order and good government of New Zealand, it was within the competence of the New Zealand Parliament.

In the same year, 1906, the question of extra-territorial operation of legislation controlling fisheries arose before the Supreme Court of Canada in The Ship "North" v The King.[30] An American ship was fishing off the Canadian coast within the three mile limit, which contravened the Fisheries Act. When hailed by an official cruiser, she fled outside the territorial water but was pursued and arrested. The Supreme Court held the legislation intra vires on the broad ground that the general power to regulate fisheries conferred upon the Dominion Parliament by the Constitution was not subject to any territorial limitations. Idington J. stated that Canada possess "as full power in every respect in relation to the sea-coast and inland fisheries of Canada as was possessed by the Imperial Parliament itself."[31]

---

29 (1906-1907) 9 G.L.R. 214, 217. Macleod was referred to in the judgment.

30 (1906) 37 S.C.R. 385.

31 Ibid., 391.

Finally, it is submitted, this question of extra-territoriality was settled beyond question by the Judicial Committee in Croft v Dunphy.[32] In 1929 Dunphy's schooner, which was registered in Nova Scotia (and Dunphy was a resident of Nova Scotia), was about eleven and a half miles away from the coast of Nova Scotia when she was boarded by the appellant, a customs officer. The cargo having been found to consist of dutiable goods, the vessel and cargo were seized and taken into the port. Dunphy sued for the return of the schooner on the ground that the statute, in so far as it authorised extra-territorial action by Canadian instrumentalities against persons and things outside Canadian territorial limits, was unconstitutional. Such action, it was argued, was not for the peace, order and good government of Canada. The Privy Council held that the customs legislation was intra vires the Canadian Parliament. Lord Macmillan, in delivering the judgment of the Privy Council stated:[33]

> Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in S.91 of the British North America Act, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully Sovereign State.

His Lordship then examined the position of the Imperial customs law:[34]

> [I]t is difficult to conceive that the Imperial Parliament in bestowing plenary powers on the Dominion Parliament to legislate in relation to customs should have withheld from it the power to enact provisions similar in scope to those which had long been an integral part of Imperical customs legislation which presumably were regarded as necessary to its efficacy.

It is important to note that the Privy Council equated the powers of the Dominion Parliament to enact customs legislation with that of the Imperial Parliament. It has been seen that a similar reasoning was adopted in Macleod v The Attorney General of New South Wales.[35] In

---

32 [1933] A.C. 156.

33 Ibid., 163. See also R v Burah (1878). 3 App. Cas 889, 904; Hodge v R (1883) 9 App. Cas. 117, 132; Reil v The Queen (1884) 10 App. Cas. 675, 678.

34 [1933] A.C. 156, 166.

35 [1891] A.C. 455.

that case too the Privy Council equated the position of the Colonial legislature as regards criminal legislation with that of the Imperial Parliament.

Croft v Dunphy, it is submitted, makes it abundantly clear that the only restriction on the legislative competence of the Dominion Parliament concerns the subject matter (as opposed to the effect) of the legislation, and if the subject matter is one over which the legislature may competently legislate, no question of extra-territoriality arises. Thus once it is found that the subject matter relates to peace, order and good government, there are no further restrictions or limitations such as extra-territoriality. This was made clear by Lord Macmillan who said:[36]

> In the view which their Lordships have taken of the present case ... the question of the validity of extra-territorial legislation by the Dominion cannot at least arise in the future.

It is submitted that this observation is of general application and not confined merely to legislation concerning the particular field subject to the decision. Further, it is important to note that his Lordship did not rely on section 3 of the Statute of Westminster at all, but left undetermined whether the Statute of Westminster had retrospective effect. This fact is of great significance inasmuch as the Judicial Committee has accepted the notion that Dominion Parliament, even prior to the Statute of Westminster, had full capacity to pass legislation having extra-territorial operation. The only restriction was whether the subject matter was one on which the legislature concerned could competently legislate. Thus the test, it is submitted, was not extra or intra territoriality but whether the legislation was for the peace, order and good government of the country in question.

> [T]he test of a Dominion's legislative power is not whether its legislation is intra-territorial. If the topic is within the powers, and requires or justifies a statute having extra-territorial operation, then there may be extra-territorial legislation.[37]

---

36 [1933] A.C. 156, 167.

37 Woolworths (N.Z.) Ltd. v Wynne [1952] N.Z.L.R. 496, 519.

Accordingly, it can be asserted with reasonable certainty that at the very latest after the decision in Croft v Dunphy, Macleod's case cannot be regarded as good law even if it was an authority prohibiting extra-territorial legislation and did not rest entirely on a question of statutory interpretation. Also, it seems that on the enactment of the Statute of Westminster it was accepted that the Dominion Parliaments were competent to pass legislation having extra-territorial effect. As has been noted earlier the report of the 1929 Conference on the Operation of Dominion Legislation, which was approved by the Imperial Conference of 1930, stated, with reference to limitations on legislation having extra-territorial operation, "that this constitutional limitation does not exist". When section 3 of the Statute of Westminister was subsequently passed in 1931 it provided that:

> It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

It may be argued that the validity of extra-territorial legislation passed before the Statute of Westminster 1931 remains an open question.[38] It is interesting to note that section 2 of the Statute of Westminister 1931, dealing with repugnancy, is expressly limited to laws "made after the commencement of this Act". But section 3, dealing with extra-territorial legislation, is not expressly so limited. It is submitted that the better view is that section 3 did in fact declare the existing law and did not extend the powers of the Dominion Parliament.

After all, it had been accepted long before the Statute of Westminster and certainly in the Balfour Declaration of 1926, that the Dominions were juridically distinguishable from the Colonies. Their nationhood had been formally declared in the most solemn form. In the report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926, the following sentences appear:[39]

---

38 Woolworths (N.Z.) Ltd. v Wynne, [1952] N.Z.L.R. 496, 518, per Adams J.

39 Cmd. 2768 (1926) 14. (Original emphasis)

> Their position and mutual relation [that is, of Great Britain and the Dominions] may be readily defined. They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.

Autonomy in policy making is certainly inconsistent with a limitation on power to enact legislation having extra-territorial effect; that the Statute of Westminster in referring to extra-territorial competence was merely declaratory of the existing position. This is quite clearly borne out by Croft v Dunphy, as mentioned above. The Judicial Committee based that decision on this premise and applied the law as it understood it to be prior to the Statute of Westminster. Evatt J., it is submitted, correctly observed that:[40]

> Croft v Dunphy proceeded upon the basis of the law as existing prior to that Statute [of Westminster].

Conclusion

It is submitted that Macleod's case was an instance of statutory interpretation and not a universally applicable decision that Dominion legislatures could not enact legislation having extra-territorial operation. Subsequent judicial history and the stand taken at the 1929 conference on the Operation of Dominion Legislation bear out this view. Also the provisions of section 3 of the Statute of Westminster were declaratory of the existing position. It is submitted that the only restriction related to subject matter. In most cases the question was whether the legislation was in respect of peace, order and good government. Once it was found to be so related, that was the end of the matter. It did not matter whether the legislation had extra-territorial effect. It

---

40 Broken Hill South Ltd. v Commissioner of Taxation (1936-37) 56 C.L.R. 357, 378. See also J.W. Salmond, "The limitations of Colonial Legislative Power", (1917) 33 L.Q.R. 117; H.A. Smith, Loc. cit.; R.G. Menzies, "The Statute of Westminster", (1938) 11 A.L.J. 368; R.O. McGechan, New Zealand and the Statute of Westminster (1944), 86.

is submitted that the Privy Council made this view abundantly clear in Croft v Dunphy[41] and the matter was closed once and for all.

---

41 [1933] A.C. 156.

APPENDIX II

ATTORNEY-GENERAL v ANTIGUA TIMES LTD [1975]
3 ALL ER. 81

Legislation of Antigua prohibited the publishing or printing of a newspaper by anyone unless, before publishing or printing the newspaper, the publisher deposited the sum of $10,000 with the Accountant-General (or provided a security for the like amount). This sum was to be drawn against in order to satisfy any judgement for libel against the editor, printer, publisher or proprietor of the newspaper concerned. It was also provided that no person should publish any newspaper unless he had obtained a licence from the Cabinet and had paid the annual fee of $600.00

The respondent challenged the validity of the legislation on the grounds that it infringed section 10 of the Constitution of Antigua relating to the enjoyment of freedom of expression.[1] Section 10

---

1 Section 10 provides:

(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includesthe freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence and other means of communication.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision - (a) that is reasonably required - (i) in the interests of defence, public safety, public order, public morality or public health; or (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating telephony, telegraphy, posts,

cont/.

corresponds substantially with section 12 of the Fiji Constitution except that in Fiji derogation from fundamental rights are permitted when they are "reasonably justifiable in a democratic society"[2] while in Antigua if they are "reasonably required".

The Privy Council held that there was a presumption that the provisions of all Acts of the Parliament of Antigua were "reasonably required" for the purposes specified in section 10 (2) of the Constitution. From this it follows that the onus is on the person attacking the legislation to rebut the presumption. Lord Fraser of Tullybelton stated:[3]

> Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.

It is interesting to note that the conclusion the Privy Council came as to "reasonably required" is that reached by the writer in relation to "reasonably justifiable in a democratic society" both as to the presumption of constitutionality of legislation and as regards the onus of proof.[4] Nevertheless, it is very unfortunate, it is submitted, that the Privy Council came to that conclusion because of the doubts and criticisms concerning it.

The writer's views in relation to the provisions of the Fiji Constitution were reached because of the language used. The Fiji provision states:[5]

---

1 cont.

wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or (b) that imposes restrictions upon public officers.

2 As to this phrase, see chap. XI, especially pp. 453 et seq., ante.

3 [1975] 3 ALL E. R. 81, 90.

4 See pp. 328 et seq., and pp. 465 et seq., ante.

5 Constitution, ss. 8(5), 9(2), 11(6), 12(2), 13(2), 14(3)(h) and 15(3)(e). (Emphasis added).

> Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the Constitution ... except so far as that provision ... is shown not to be reasonably justifiable.

The presumption emerges from the provision, especially the last seven words.[6]

On the other hand, the provision of the Antigua Constitution is different. It declares:

> Nothing contained ... shall be held to be inconsistent ... to the extent that the law in question makes provision ... that is reasonably required.

It is submitted that this provision allows derogation if the law is "reasonably required". The Fiji provision allows derogation unless it is shown not to be reasonably justifiable in a democratic society. The latter provision clearly presupposes validity but not so the former. The Antigua provision, it is submitted, puts the onus on the party attempting to justify the derogation.

It seems the Privy Council has adopted the view that derogation is the rule and the rights as exceptions.[7] In any event, the Privy Council does not seem to have given very serious consideration to the issues involved. It gave no reason for adopting the reasoning it chose. The Judicial Committee, with respect, seems to have followed too closely the approach of Dicey and the English constitutional jurisprudence, where Parliament is sovereign and supreme

---

6 For a fuller discussion on this provision, see pp. 328 et seq., and pp. 465 et seq., ante.

7 See pp. 332 et seq., ante.

without legal fetters. Also, it seems, the conclusion was arrived at as a matter of expediency, Lord Fraser stated:[8]

> In some cases it may be possible for a Court to decide from a mere perusal of an Act whether it was or was not reasonably required. In other cases the Act will not provide the answer to that question. In such cases has evidence to be brought before the court of the reasons for the Act and to show that it was reasonably required? Their Lordships think that the proper approach to the question is to presume, until the contrary appears or is shown, that all Acts passed by the Parliament of Antigua were reasonably required.

As for the question of calling evidence, it is very unfortunate that the Privy Council made no constructive contribution at all. This matter, has been dealt with in some detail by the writer.[9]

The Privy Council also said that, if the statutory provision gives arbitrary powers, it can amount to unconstitutional legislation. Lord Fraser thus said[10] that a law cannot be reasonably required,

> if the statutory provisions in question are ... so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power but constitutes in substance and effect, the direct execution of a different and forbidden power.

The writer made the same contention in the thesis as regards arbitrary powers.[11]

The conclusion reached by the Privy Council in relation to

---

8 [1975] 3 ALL E.R. 81, 90.

9 See pp.364 et seq., ante.

10 [1975] 3 ALL E.R. 81, 90.

11 See pp.462 et seq., ante.

the requirement of the deposit of the $10,000 is regrettable. It was held by the Judicial Committee that such a requirement was reasonably required for the protection of the reputations and rights of others. It is submitted, with respect, that the approach of Lewis C.J. is preferable. The learned Chief Justice held that the right of action for libel gives the true protection to the injured person's reputation. The Privy Council felt that such a protection was of little avail if the injured person was not able to enforce his judgement by obtaining the damages and costs that might be awarded. "A mere right of action is not likely to be regarded by him as an adequate protection of his reputation."[12] The Privy Council further took the view that the fact that the deposit would be used to satisfy a judgement for libel and that, if it was, it must be replenished by the publishers, is an inducement to the publishers to take care not to libel and to damage unjustifiably the reputation of others.[13]

It seems, it is submitted, that the Privy Council has stretched the matter too far and paid undue regard to the word "required" in the proviso, without considering the word "reasonably" in conjunction with it. The Act said that the money so deposited would be used to satisfy any judgement for libel. On that point it may be conceded that the legislation was "required". But was it reasonably so? It is submitted that there ought to have been some foundation laid for such a legislation to be reasonably required. If there were some evidence, for instance, that there were a sufficient number of cases in which judgement had been secured for libel but enforcement had been difficult, this would have been

---

12 [1975] 3 ALL E.R. 81, 91.

13 Idem.

relevant. Alternatively it might have been shown that a number of publishing companies had very few assets, or most of their assets were outside the country, and hence judgement would be difficult to enforce. Under these circumstances it may have been proper to conclude that the legislation was not only required but reasonably so. However, in the absence of any such evidence of reasonableness, it is submitted, the Privy Council decision should not be supported.

In any event, even without such evidence of reasonableness, to uphold the legislation as a means of protecting the reputation of others, is taking the matter too far. If such reasoning is accepted, the authorities can circumvent other parts of the fundamental rights provisions without much difficulty and with impunity. For instance, sections 12 and 13 of the Fiji Constitution protect freedom of expression and those of assembly and association. The legislature could easily circumvent such protections under the reasoning adopted by the Privy Council. Because there is a chance of an individual uttering defamatory wards in a public meeting, the legislature could impose a condition that before holding a public meeting , each speaker must deposit $2,000 with the Accountant-General.

There have been many "illegal" strikes in Fiji. The position of "lightning" strikes became so bad that the Fiji Parliament was obliged to pass the Trade Disputes Act 1973 to prevent these strikes. In spite of this legislation members of several unions continue to strike contrary to the provisions of the Act and cause employers severe losses. Strictly those employers may have a right of action against striking employees and perhaps against the union officials. Whether they will be able to recover any damages

awarded is another matter. This is particularly so where the employees have few assets. On the reasoning of the Privy Council in ANTIGUA TIMES case the Fiji Parliament will have little difficulty in imposing restrictions on union membership. It could impose the condition that every person who becomes a trade union member must deposit the sum of $500.00 with the Accountant-General. Also it could impose a term that on registration every union must deposit the sum of $2,000 with the Accountant-General. Both these deposits are to be drawn against to satisfy any judgement entered for loss occasioned to employers through illegal strikes. Such provisions would be "justifiable" as being for the protection of the rights of the employers. Other examples could be given.

The above examples show the difficulties that can arise in safeguarding the fundamental rights and freedoms in face of the reasoning adopted by the Privy Council. It is hoped the conclusion arrived at by the Privy Council would in future be treated as a "special case" and not of general application. If it is adopted as of general application, serious inroads can be made in the fundamental rights and freedoms of the individual. Regrettably the government could abuse its powers for political reasons. The legislation may have an ostensibly impeccable purpose but the effect of the enactment may have very serious repercussions on the fundamental rights and liberties of the individual. Once again it is reiterated that liberty must be the rule and derogation an exception.

BOOKS

Abraham, Henry J., Freedom and the Court, Oxford University Press, New York, 2nd ed., 1972.

Abraham, Henry J., The Judicial Process, Oxford University Press, New York.

Abraham, Henry J., The Judiciary, the Supreme Court in the Governmental Process, Allyn and Bacon, Boston, 2nd ed., 1969.

Allen, Sir Carleton K., The Law in the Making, The Clarendon Press, Oxford, 7th ed., 1964.

Anson, W.R., The Law and Custom of the Constitution, Clarendon Press, Oxford, 5th ed., 1922.

Asquith, H.H., Fifty Years of Parliament, Vol. II., Cassell & Co., London, 1926.

Basu, D.D., Commentary on the Constitution of India, Vol. I, II, III and V, S.C. Sarkar, Calcutta, 5th ed., 1970.

Berger, R., Congress V The Supreme Court, (1969), Harvard University Press, Cambridge, Massachusettes.

Burns, Sir Alan., FIJI, Her Majesty's Stationary Office, London, 1963.

Burton, J.W., The Fiji of Today, C.H. Kelly, London, 1910.

Calvert, Harry G., Constitutional Law in Northern Ireland, Stevens and Sons, London, 1968.

Campbell, Alan., Common Market Law, Longmans, London, 1969.

Campbell, E., Parliamentary Privilege in Australia, University Press, Melbourne, 1966.

Cardozo, B.N., The Nature of the Judicial Process, Yale University Press, New Haven and London, 1921.

Corwin, E.S. The Constitution and What it Means Today, Princeton Univ. Press, Princeton, 12th ed., 1958.

Cowen, D.V., The Foundation of Freedom, Juta, Capetown, 1960.

Cowen, D.V., Parliamentary Sovereignty and the Entrenched Sections of the South Africa Act, Juta, Capetown and Johannesburg, Second impression, 1951.

Craies, W.F., Statute Law, Sweet and Maxwell, London, 7th ed., 1971.

Currie, D.P., Federal Courts : Cases and Materials, West Publishing Co., St. Paul, Minnesota, 1968.

De Smith, S.A., Judicial Review of Administrative Action, Stevens and Sons Ltd., London., 3rd ed., 1973.

Denning, Sir Alfred T., Freedom Under the Law, Stevens, London, 1949.

De Smith, S.A., The New Commonwealth and its Constitutions, Stevens and Sons Ltd., London, 1964.

Dicey, A.V., The Law of the Constitution, Macmillan, London, 10th ed., 1959.

Douglas, W.O., "The Bill of Rights is not Enough" in The Great Rights, edited by E.N. Cahan, the Macmillan Co., New York, 1963.

Evatt, H.V., The King and His Dominion Governors, Cheshire, Melbourne, 2nd ed., 1967.

Feilden, H.S.C., A Short Constitutional History of England, Blackwell, Oxford, 3rd ed., 1908.

Forsey, E.A., The Royal Power of Dissolution of Parliament in the British Commonwealth, Oxford University Press, Toronto, 1943, Second Impression, 1968.

Friedrich, G.J., Constitutional Government and Democracy, Blaisdell, Waltham, Massachusettes (4th ed., 1968).

Gray, J.C., The Nature and Sources of the Law, Macmillan, New York, 8th ed., 1970.

Halsbury, Laws of England, Vol. V. Butterworth, 3rd ed., 1953.

Henderson, G. The Evolution of Government in Fiji, Angus and Robertson, Sydney, 1935.

Henderson, G.C., Fijian Documents; Political and Constitutional 1858-1875, Angus and Roberston, Sydney, 1938.

Heuston, R.F.V., Essays in Constitutional Law, Stevens, London, 2nd ed., 1964.

Holdsworth, W.S., A History of English Law (7th ed., 1956). Vol. I, (3rd ed., 1923) Vol. II. and (1st ed.) Vol. 10, Methuen & Co. Ltd., London.

Howard, C., Australian Federal Constitutional Law, Law Book Co., Sydney, 2nd ed., 1972.

Hudson, W.J., Australia and the Colonial Question at the United Nations, Sydney University Press, Sydney, 1970.

Hughes, E., Parliament and Mumbo-Jumbo, Allen & Unwin, London, 1966.

Jennings, W. Ivor., The Approach to Self Government, University Press, Cambridge, 1956.

Jennings, W. Ivor, Cabinet Government, the University Press, Cambridge, 3rd ed., 1959.

Jennings, W. Ivor and Tambiah, H.W., The Dominion of Ceylon : The Development of its Laws and Constitution, Stevens, London, 1952.

Jennings, W. Ivor., The Law and the Constitution, University of London Press., London, 5th ed., 1959.

Jennings, W. Ivor., Parliament, University Press, Cambridge, 2nd ed., 1957.

Keir, D.L. and Lawson, F.H., Cases in Constitutional Law, Oxford University Press, 5th ed., 1967.

Keith, A.B., Letters on Imperial Relations, Indian Reform, Constitutional and International Law 1916-1935 (1935), Oxford University Press, London, 1935.

Keith, A.B., Selected Speeches and Documents on British Colonial Policy, Vol. II, Oxford University Press, 1918 .

Kitzinger, U., "The Realities of Sovereignty" in Britain and the Common Market, British Broadcasting Corporation, (1967).

Locke, John., Two Treatises of Government, the New American Library, New York, revised ed., 1963.

McGechan, R.O., New Zealand and the Statute of Westminster, Victoria University College, Wellington, 1944.

McHugh, J.J., The Colony of Fiji 1874-1929, Fiji Government Printer, Suva, 1929.

Marriott, J.A.R., Second Chambers, The Clarendon Press, Oxford, 2nd ed., 1927.

Maxwell, P.B., The Interpretation of Statutes, William Maxwell, London, 12th ed., 1969.

May, Erskine, Treatise on the Law, Privileges, Proceedings and Usages of Parliament, Butterworths, London, 18th ed., 1971.

Mayer, Adrian C., Peasants in the Pacific, Routledge and Kegan Paul, London, 2nd ed., 1973.

Mitchell, J.D.B., Constitutional Law, W. Green, Edinburgh, 2nd ed., 1968.

Nwabueze, B.O., Constitutionalism in the Emergent States, Hurst, London, 1973.

Oppenheim, L. International Law, Vol. 1., Longmans, Green and Co., London, New York, Toronto, 8th ed., 1955.

Phillips, O. Hood., Constitutional and Administrative Law, Sweet and Maxwell, London, 5th ed., 1973.

Plucknett, T.F.T., A Concise History of the Common Law, Butterworth, London, 5th ed., 1956.

Ridges, E.V., Constitutional Law of England, Stevens, London, 7th ed., 1939.

Roberts-Wray, K.O., Commonwealth and Colonial Law, Stevens, London, 1966.

Roth, G.K., The Fijian Way of Life, Oxford University Press, London, 1953.

Sawer, G., Australian Federalism in the Courts, University Press, Melbourne, 1967.

Schwartz, B., The Bill of Rights : A Documentary History, Chelsea House Publishers, 1971.

Scott, K.J., The New Zealand Constitution, Clarendon Press, Oxford, 1962.

Spender, J.A., and Asquith, C., Life of Herbert Henry Asquith Vol II, Hutchinson, London, 1932.

Strong, C.F., Modern Political Constitutions, Sidgwick & Jackson, London, 6th ed., 1963.

Tarnopolsky, W.S., The Canadian Bill of Rights Vol. 4, Carswell, Toronto, 1966.

Thayer, C.J.B., A Preliminary Treatise on Evidence At the Common Law, Little Brown, Boston, 1898.

Warren, Charles., The Supreme Court in United States History, Vol. I., Little Brown & Co., Boston, 1937.

Wheare, K.C., Modern Constitutions, Oxford Univ. Press, London, New York, 1951.

Wigmore, J.H., A Treatise on Evidence, Vol. 4, Little Brown, Boston, 3rd ed., 1940.

Wynes, W.A., Legislative, Executive and Judicial Powers in Australia, Law Book Co. of Australasia, Sydney, 4th ed., 1970.

Zamir, I., The Declaratory Judgment, Stevens, London, 1962.

ARTICLES DISSERTATIONS AND REPORTS

Aihe, D.O., "An Evaluation of the Role of the Judiciary in the Working of the Nigerian Constitution Since 1960", (1971) 5 The Quarterly Journal of Administration, Institute of Administration, University of Ife, 439.

Aihe, D.O., "Fundamental Human Rights Provisions as Means of Achieving Justice in Society : The Nigerian 'Bill of Rights' ", (1973) 15 Malaya L. Rev. 39.

Aihe, D.O., "Neo-Nigerian Human Rights in Zambia : A Comparative Study with Some Countries in Africa and West Indies", (1970) 12 Journal of the Indian Law Institute 609.

Al Katz., "The Jurisprudence of Remedies : Constitutional Legality and the Law of Torts in Bell V Hood", (1969) 117 U. Pa. L. Rev. 1.

Amera Singhe, C.F., "The Legal Sovereignty of the Ceylon Parliament", (1967) Pub. Law 65.

Auburn, F.M., "Trends in Comparative Constitutional Law", (1972) M.L.R. 129.

Beinart, B. "The Parliament and the Courts:, (1954) S.A.L.R. 135.

Bender, P., "The Retroactive Effect of an Overruling Constitutional Decision : Mapp V Ohio, (1962) 110 U. Pa. L. Rev. 650.

Berle, A.A., "Constitutional Limitations on Corporate Activity - Protection of Personal Rights from Invasion Through Economic Power", (1952) 100 U. Pa. L. Rev. 933.

Bickle, H.W., "Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action", (1924-1925) 38 Harv. L. Rev. 6.

Bhardway, V.K., "Canada and Entrenched Bill of Rights : A Visitor's View-Point", (1972) 14 Journal of Ind. L. Inst. 187.

Borovoy, A.A., "Civil Liberties in the Imminent Hereafter", (1973) Can. B. Rev. 93.

Borrie, C.J., "The Advantages of the Declaratory Judgment in Administrative Law:, (1955) 18 M. L. Rev. 138.

Brazil, P., "Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular", (1964) 4 Univ. Queens. L.J. 1.

Brett, P., "Reflection on the Canadian Bill of Rights", (1967) 7 Alberta L. Rev. 294.

Bridge, J.W., "The Legislative Competence of the New Zealand Parliament", (1969) Pub. L. 112.

Carnegie, A.R., "Judicial Review of Legislation in the West Indian Constitutions", (1971) Public Law 276.

Carpenter, C.E., "Court Decisions and the Common Law", (1917) 17 Column. L. Rev. 593.

Cheung, K.W., "The Abortion Decision - A Qualified Constitutional Right in the United States : Whither Canada?", (1973) Can. B. Rev. 643.

Clark, E., "Charitable Trusts, The Fourteenth Amendment and the Will of Stephen Girard", (1957) 66 Yale. L.J. 979.

Comments "Linkletter, Short, and the Retroactive Problem in Escobedo", (1965-1966) 64 Mich. L. Rev. 832.

Corry, J.A., "The Use of Legislative History in the Interpretation of Statutes", (1954) 32 Can. Bar. Rev. 624.

Cowen, D.V., "Human Rights on Contemporary Africa", (1964) Natural Law Forum 1.

Cowen, D.V., "Legislature and Judiciary", (1952) 15 M.L.R. 282 and (1953) 16 M.L.R. 273.

Davis, A.G., "Invalidity of General Election", (1955) N.Z.L.J. 135.

Davis, K.C., "Legislative History and the Wheat Board Case", (1953) 31 Can. Bar. Rev. 1.

De Smith, S.A., "Fundamental Rights in the Commonwealth", (1961) 10 I.C.L.Q. 83.

Dellinges, W.E., "Of Rights and Remedies : The Constitution as a Sword", (1972) 85 Harv. L. Rev. 1532.

Dix, E.J., "The Origins of the Action of Trespass on the Case", (1937) 46 Yale L.J. 1142.

Dixon, Sir Owen., Marshall and the Australian Constitution", (1955) 29 A.L.J. 420.

Dodd, W.F., "Judicially Non-enforceable Provisions of Constitutions", (1931) 80 Univ. Pa. L. Rev. 54.

Donaldson, A.G., "Fundamental Rights in the Constitution of Northern Ireland" (1959) 37 Can. Bar. Rev. 189.

Fazal, M.A., "Entrenched Rights and Parliamentary Sovereignty",(1974) Pub. Law. 295.

Forman, J., "The European Communities Act 1972, The Government's Position on the Meaning and Effect of its Constitutional Provisions" (1973) 10 C.M.L. Rev. 39.

Frankfurter, F., "Some Reflections on the Reading of Statutes", (1947) 47 Colum. L. Rev. 527.

Freeman, R.H., "The Protection Afforded Against the Retroactive Operation of an Overruling Decision", (1918) 18 Colum. L. Rev. 230.

Friedmann, W., "Trethowan's Case, Parliamentary Sovereignty, and the Limits of Legal Change" (1950) 24 Aust. L.J. 103.

Ghai, Y.P., "Constitutions and the Political Order in East Africa" 21 I.C.L.Q. 403.

Ghai, Y.P., "The Kenya Council of State" (1963) 12 I.C.L.Q. 1079.

Gillion, K.L., "The Source of Indian Emigration to Fiji", Population Studies, (1956) Vol. V, No. 2.

Gilmour, D.R., "The Sovereignty of Parliament and the European Commission of Human Rights", (1968) Pub. Law 62.

Grant, J.A.C., "Judicial Control of Legislative Procedure in California", (1949) 1 Stanford L. Rev. 428.

Gray, H.R., "The Sovereignty of Parliament Today", (1935) 10 U. Toronto L.J. 54.

Hickling, R.H., "The First Five Years of the Federation of Malaya Constitution", (1962) 4 Malaya L. Rev. 183.

Holdsworth, W.S., "Central Courts Of Law and Representative Assemblies in the Sixteenth Century", (1912) 12 Co. L. Rev. 1.

Holland, D.C., "Human Rights in Nigeria", (1962) 15 Current Legal Problems 145.

Holmes, J.D., "Evidence in Constitutional Cases" (1949) 23 A.L.J. 235.

Honore, A.M., "Social Justice", (1962) 8 McGill Law Journal 77.

Hunnings, N.M., "Constitutional Implications of Joining the Common Market", (1968-1969) C.M.L. Rev. 60.

Irani, P.K., "The Courts and the Legislature in India", (1965) 14 I.C.L.Q. 950.

Jaffe, Louis L., "Judicial Review : Question of Law" (1955-1956) 69 Harv. L. Rev. 239.

Kastari, P., "The Constitutional Protection of Fundamental Rights in Finland" (1960) 34 Tul. L. Rev. 695.

Keesing, Contemporary Archives, 1974.

Keith, K.J., "The Courts and the Conventions"(1967) 16 I.C.L.Q. 542.

Kilgour, D.G., "The Rule Against the Use of Legislative History" (1952) 30 Can. Bar. Rev. 769.

Lane, P.H., "Facts in Constitutional Law" (1963) 37 A.L.J. 108.

Laskin, Bora "Canadian Bill of Rights : A Dilemma for the Courts?" (1962) 11 Int. & Comp. L.Q. 519.

Laskin, Bora "The Constitutional Systems of Canada and the United States : Some Comparisions" (1966-1967) 16 Buffalo L. Rev. 591.

Levy, B.H. "Realist Jurisprudence and Prospective Overruling" (1960) 109 U. Pa. L. Rev. 1.

McLaughlin, R.N., "Canadian Bill of Rights, - R v Smythe - 'Equality Before the Law' - The meaning of Discrimination'" (1973) Can. B. Rev. 517.

McNamara, P.A., "Contempt of Parliament in Papua and New Guinea"(1970). 4 F.L.R. 130.

McWhinney, E., "The Supreme Court and the Bill of Rights - The Lessons of Comparative Jurisprudence" (1959) 37 Can. Bar. Rev. 16.

Marshall, H.H., "Interpretation of the Constitution of Western Nigeria : A Privy Council Decision", (1964) 13 I.C.L.Q. 280.

Middleton, K.W.B., "Sovereignty in Theory and Practice" (1952) 64 Jurid. Rev. 135.

Mishkin, P.J., "The Supreme Court - Forward" (1965) 79 Harv. L. Rev. 56.

Mitchell, J.D.B., "British Law and British Membership" (1971) 6 Europarecht 97.

Mitchell, J.D.B., "Constitutional Aspects of the Treaty and Legislation Relating to British Membership" (1972) 9 C.M.L. Rev. 134.

Mitchell, J.D.B., "Sovereignty of Parliament - Yet Again" (1963) 79 L.Q.R. 196.

Mitchell, J.D.B., " 'What Do You Want To Be Inscrutable For, Marcia?' or The White Paper on the Legal and Constitutional Implications of United Kingdom Membership of the European Communities" (1967-1968) 5 C.M.L. Rev. 112.

Moschzisker, R.V., "Stare Decisis in Court of Last Resort" (1924) 37 Harv. L. Rev. 409.

Munro , C.R., "Laws and Conventions Distinguished" (1975) 91 L.Q.R. 218.

Northey, J.F. "An experiment in Unicameralism" (1958) pub. Law. 265.

Northey, J.F., "Constitutional Law : Invalidity of General Elections" (1955) 31 N.Z.L.J. 123.

Northey, J.F., The Governor-General of New Zealand, (1950) Doctoral Thesis, University of Toronto.

Northey, J.F., "The New Zealand Constitution" A.G. Davis Essays in Law (1965)

Northey, J.F., "The Prerogative Power of Dissolution" (1951) 27 N.Z.L.J. 204.

Notes (1947) 60 Harv. L. Rev. 437.

"Avoidance of Constitutional Issues in Civil Rights Cases" (1948) 48 Colum. L. Rev. 427.

"Supreme Court Interpretation of Statutes to Avoid Constitutional Decisions (1953) 53 Colum. L. Rev. 633.

"The Effect of Overruled and Overruling Decision on Intervening Transactions" (1933-1934) 47 Harv. L. Rev. 1403.

Notes and Comments, "Prospective Overruling and Retroactive Application in the Federal Courts" (1961-1962) 71 Yale L. Rev. 907.

Ostrager, B.R., "Retroactivity and Prospectivity of Supreme Court Constitutional Interpretations", (1973) 19 New York Law Forum, 289.

Palley, C., "Rethinking the Judicial Role" (1969) 1 Zambia L. Journal, 1.

Parliamentary Debates., Fiji Legislative Council Debates, 1912, 1915, 1923, 1929, 1932, 1935, 1938, 1940, 1944, 1945, 1948, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, and 1970.

Fiji Parliamentary Debates, 1971, 1973, and 1974.

New Zealand Parliamentary Debates, 1973.

Pearce, D.C., "Contempt of Parliament - Instrument of Politics or Law?" (1968) 3 F.L. Rev. 241.

Pigeon, Louis Phillipe., "Bill of Rights and the British North America Act" (1959) 37 Can. B. Rev. 66.

Pacific Islands Monthly., 1965, 1966, 1967, 1968, 1973.

Ramsden, W.A., "Judicial Protection in Swaziland" (1973) 6 The Comparative and International Law Journal of Southern Africa, 378.

Reports., The Report of the Advisory Commission on the Review of the Constitution of Rhodesia and Nysaland, Cmd. 1148 (1960).

The Report of the Bryce Conference of 1917-1918, Cmd. 9038 (1918).

The Report of the Commission of Enquiry into the Natural Resources and population Trends of the Colony of Fiji", Fiji Legislative Council Paper No. 1. of 1960.

The Report of the Conference on the Operation of Dominion Legislation, Cmd. 3479 (1929).

Fiji Annual Report 1971, Government Printer, Suva, Fiji.

The Report of the Fiji Constitutional Conference 1965., Cmnd. 2783 (1965).

The Report of the Fiji Constitutional Conference, 1970., Cmnd. 4389 (1970).

Fiji Royal Gazette 1883,1905, 1916, 1929, 1963,1972.

"The Fijian People : The Economic Problems and Prospects", Fiji Legislative Council Paper No. 13 of 1959.

The Journal of the Fiji Legislative Council, 1915, 1921, 1930, 1937, 1949, 1959, 1960 and 1961.

"Government Proposals for Constitutional Reforms" Fiji Legislative Council Paper No. 8 of 1961.

"Legal and Constitutional Implications of United Kingdom Membership of the European Communities" Cmnd. 3301 (1967).

The Report of the New Zealand Constitutional Reform Committee, Appendix to the Journals of the House of Representatives (1952) Vol. IV, 1-18.

Proposed Changes in the Composition of the Legislative Council, Fiji Legislative Council Paper No. 40 of 1961.

The Report of the Public Service Reorganization Committee, Fiji Legislative Council Paper No. 2 of 1937.

The Report from the Select Committee on Parlimentary Privilege, H.C. 35 of 1967-1968.

The Report of the Special Commission on the Constitution of Ceylon, Cmd. 3131 (1928).

The Summary of the Proceedings of the Imperial Conference of 1930, Cmd. 3717 (1930).

Richardson, A.G. and Sayles, G. "The Early Statutes" (1934) 50 L.Q.R. 540.

Riddiford, D.J., "A Suitable Chamber for New Zealand", (1951) 27 N.Z.L.J. 102.

Riddiford, D.J., "An Effective Second Chamber : Reasons for its Existence" (1950) N.Z.L.J. 313.

Riddiford, D.J., "New Legislative Council for New Zealand" (1950) 26 N.Z.L.J. 329.

Sahu Khan, A.R., "Muslim Appeal for Separate Political Rights in Fiji" Oceania Printery, Suva, Fiji, 1958.

Salmond, J.W., "The Limitations of Colonial Legislative Power" (1917) 33 L.Q.R. 117.

Schwartz, R.D., "Retroactivity, Reliability, and Due Process : A reply to Professor Mishkin", (1965-1966) 33 Univ. Chic. L. Rev. 719.

Smith, H.A., "Extra-Territorial Legislation" (1923) 1 Can. Bar. Rev. 338.

Smout, D.A.L., "An Inquiry into the Law on Racial and Religious Restraints on Alienation" (1952) 30 Can. Bar. Rev. 863.

Stern, R.L., "Separability and Separability Clauses in the Supreme Court" (1937-1938) 51 Harv. L. Rev. 76.

Thompson, D. and Marsh, N.S., "The United Kingdom and the Treaty of Rome" (1962) 11 I.C.L.Q. 77.

Wade, H.W.R., "The Basis of Legal Sovereignty" (1955) Camb. L.J. 172.

Waline, M. "The Constitutional Council of the French Republic" 1963) 12 Am.J.C.L. 482.

UNIVERSITY OF AUCKLAND
LAW SCHOOL LIBRARY
76/1/6300 346/02
Thesis
P3/7
SAH
cop. 2
V.3.
L489/76
10.8.76

L489/76
P3/7
SAH
v.3

EXTRAORDINARY

347

FIJI ROYAL GAZETTE SUPPLEMENT

No. 40 TUESDAY, 6th OCTOBER 1970

[LEGAL NOTICE NO. 109]

FIJI INDEPENDENCE ACT 1970

(CHAPTER 50)

ARRANGEMENT OF SECTIONS

Section
1. Fully responsible status of Fiji.
2. Consequential modifications of British Nationality Acts.
3. Retention of citizenship of United Kingdom and Colonies by certain citizens of Fiji.
4. Consequential modification of other enactments.
5. Interpretation.
6. Short title.

SCHEDULES:
Schedule 1—Legislative powers of Fiji.
Schedule 2—Amendments not affecting the law of Fiji.

An Act to make provision for, and in connection with, the attainment by Fiji of fully responsible status within the Commonwealth.

[23rd July, 1970]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Fully responsible status of Fiji.

1.—(1) On and after 10th October 1970 (in this Act referred to as "the appointed day") Her Majesty's Government in the United Kingdom shall have no responsibility for the government of Fiji.

(2) No Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to Fiji as part of its law; and on and after that day the provisions of Schedule 1 to this Act shall have effect with respect to the legislative powers of Fiji.

Consequential modifications of British Nationality Acts. 1948 c. 56.

2.—(1) On and after the appointed day the British Nationality Acts 1948 to 1965 shall have effect as if in section 1(3) of the British Nationality Act 1948 (Commonwealth countries having separate citizenship) there were added at the end the words "and Fiji".

(2) Except as provided by section 3 of this Act, any person who immediately before the appointed day is a citizen of the United Kingdom and Colonies shall on that day cease to be such a citizen if he becomes on that day a citizen of Fiji.

(3) Section 6(2) of the British Nationality Act 1948 (registration as citizens of the United Kingdom and Colonies of women who have been married to such citizens) shall not apply to a woman by virtue of her marriage to a person who on the appointed day ceases to be such a citizen under subsection (2) of this section, or who would have done so if living on the appointed day.

1967 c. 4.

(4) In accordance with section 3(3) of the West Indies Act 1967, it is hereby declared that this and the next following section extend to all associated states.

Retention of citizenship of United Kingdom and Colonies by certain citizens of Fiji.

3.—(1) Subject to subsection (5) of this section, a person shall not cease to be a citizen of the United Kingdom and Colonies under section 2(2) of this Act if he, his father or his father's father—

(*a*) was born in the United Kingdom or in a colony or an associated state; or

(*b*) is or was a person naturalised in the United Kingdom and Colonies; or

(*c*) was registered as a citizen of the United Kingdom and Colonies; or

(*d*) became a British subject by reason of the annexation of any territory included in a colony.

(2) A person shall not cease to be a citizen of the United Kingdom and Colonies under the said section 2(2) if either—

(*a*) he was born in a protectorate or protected state, or

(*b*) his father or his father's father was so born and is or at any time was a British subject.

(3) A woman who is the wife of a citizen of the United Kingdom and Colonies shall not cease to be such a citizen under the said section 2(2) unless her husband does so.

(4) Subject to subsection (5) of this section, the reference in subsection (1)(*b*) of this section to a person naturalised in the United Kingdom and Colonies shall include a person who would, if living immediately before the commencement of the British Nationality Act 1948, have become a person naturalised in the United Kingdom and Colonies by virtue of section 32(6) of that Act (persons given local naturalisation in a colony or protectorate before the commencement of that Act).

1948 c. 56.

(5) In this section—

(*a*) references to a colony shall be construed as not including any territory which, on the appointed day, is not a colony for the purposes of the British Nationality Act 1948 as that Act has effect on that day, and accordingly do not include Fiji, and

(*b*) references to a protectorate or protected state shall be construed as not including any territory which, on the appointed day, is not a protectorate or a protected state (as the case may be) for the purposes of that Act as it has effect on that day;

and subsection (1) of this section shall not apply to a person by virtue of any certificate of naturalisation granted or registration effected by the Governor or Government of a territory which by virtue of this subsection is excluded from references in this section to a colony, protectorate or protected state.

(6) Part III of the British Nationality Act 1948 (supplemental provisions) as in force at the passing of this Act shall have effect for the purposes of this section as if this section were included in that Act. 1948 c. 56.

4.—(1) Notwithstanding anything in the Interpretation Act 1889, the expression "colony" in any Act of the Parliament of the United Kingdom passed on or after the appointed day shall not include Fiji. Consequential modification of other enactments. 1889 c. 63.

(2) On and after the appointed day—

(*a*) the expression "colony" in the Army Act 1955, the Air Force Act 1955 and the Naval Discipline Act 1957 shall not include Fiji, and 1955 c. 18. 1955 c. 19. 1957 c. 53.

(*b*) in the definitions of "Commonwealth force" in section 225(1) and 223(1) respectively of the said Acts of 1955, and in the definition of "Commonwealth country" in section 135(1) of the said Act of 1957, at the end there shall be added the words "or Fiji";

and no Order in Council made on or after the appointed day under section 1 of the Armed Forces Act 1966 which continues either of the said Acts of 1955 in force for a further period shall extend to Fiji as part of its law. 1966 c. 45.

(3) On and after the appointed day the provisons specified in Schedule 2 to this Act shall have effect subject to the amendments specified respectively in that Schedule.

(4) Subsection (3) of this section, and Schedule 2 to this Act, shall not extend to Fiji as part of its law.

5.—(1) In this Act, and in any amendment made by this Act in any other enactment, "Fiji" means the territories which immediately before the appointed day constitute the Colony of Fiji. Interpretation.

(2) References in this Act to any enactment are references to that enactment as amended or extended by or under any other enactment.

6. This Act may be cited as the Fiji Independence Act 1970. Short title.

SCHEDULES

Section 1.

SCHEDULE 1

LEGISLATIVE POWERS OF FIJI

1865 c 63.

1. The Colonial Laws Validity Act 1865 shall not apply to any law made on or after the appointed day by the legislature of Fiji.

2. No law and no provision of any law made on or after the appointed day by that legislature shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any Act of the Parliament of the United Kingdom, including this Act, or to any order, rule or regulation made under any such Act, and accordingly the powers of that legislature shall include the power to repeal or amend any such Act, order, rule or regulation in so far as it is part of the law of Fiji.

3. The legislature of Fiji shall have full power to make laws having extra-territorial operation.

4. Without prejudice to the generality of the preceding provisions of this Schedule—

1894 c. 60.

(*a*) sections 735 and 736 of the Merchant Shipping Act 1894 shall be construed as if references therein to the legislature of a British possession did not include references to the legislature of Fiji; and

1890 c. 27.

(*b*) section 4 of the Colonial Courts of Admiralty Act 1890 (which requires certain laws to be reserved for the signification of Her Majesty's pleasure or to contain a suspending clause) and so much of section 7 of that Act as requires the approval of Her Majesty in Council to any rules of court for regulating the practice and procedure of a Colonial Court of Admiralty shall cease to have effect in Fiji.

Section 4.

SCHEDULE 2

AMENDMENTS NOT AFFECTING THE LAW OF FIJI

Diplomatic Immunities

1952 c. 18.

1. In section 1(6) of the Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act 1952, before the word " and " in the last place where it occurs there shall be inserted the word " Fiji ".

1961 c. 11.

2. In section 1(5) of the Diplomatic Immunities (Conferences with Commonwealth Countries and Republic of Ireland) Act 1961, before the word " and " in the last place where it occurs there shall be inserted the word " Fiji ".

Financial

3. In section 2(4) of the Import Duties Act 1958, before the words " together with " there shall be inserted the word " Fiji ". 1958 c. 6.

Visiting forces

4. In the Visiting Forces (British Commonwealth) Act 1933, section 4 (attachment and mutual powers of command) shall apply in relation to forces raised in Fiji as it applies to forces raised in Dominions within the meaning of the Statute of Westminister 1931. 1933 c. 6. 1931 c. 4 (22 & 23 Geo. 5).

5. In the Visiting Forces Act 1952— 1952 c. 67.

(*a*) in paragraph (*a*) of section 1(1) (countries to which that Act applies) at the end there shall be added the words " Fiji or " ;

(*b*) in section 10(1)(*a*), the expression " colony " shall not include Fiji;

and, until express provision with respect to Fiji is made by an Order in Council under section 8 of that Act (application to visiting forces of law relating to home forces), any such Order for the time being in force shall be deemed to apply to visiting forces of Fiji.

Ships and aircraft

6. In section 427(2) of the Merchant Shipping Act 1894, as set out in section 2 of the Merchant Shipping (Safety Convention) Act 1949, before the words " or in any " there shall be inserted the words " or Fiji ". 1894 c. 60. 1949 c. 43.

7. The Ships and Aircraft (Transfer Restriction) Act 1939 shall not apply to any ship by reason only of its being registered in, or licensed under the law of, Fiji; and the penal provisions of that Act shall not apply to persons in Fiji (but without prejudice to the operation with respect to any ship to which that Act does apply of the provisions thereof relating to the forfeiture of ships). 1939 c. 70.

8. In the Whaling Industry (Regulation) Act 1934, the expression " British ship to which this Act applies " shall not include a British ship registered in Fiji. 1934 c. 49.

9. In section 2(7)(*b*) of the Civil Aviation (Licensing) Act 1960, the expression " colony " shall not include Fiji. 1960 c. 38.

Commonwealth Institute

10. In section 8(2) of the Imperial Institute Act 1925, as amended by the Commonwealth Institute Act 1958 (power to vary the provisions of the said Act of 1925 if an agreement for the purpose is made with the governments of certain territories which for the time being are contributing towards the expenses of the Commonwealth Institute) at the end there shall be added the words " and Fiji ". 1925 ch. xvii. 1958 c. 16.

[LEGAL NOTICE NO. 110]

THE FIJI INDEPENDENCE ORDER 1970

At the Court at Balmoral

The 30th Day of September 1970

Present,

THE QUEEN'S MOST EXCELLENT MAJESTY
IN COUNCIL

Her Majesty, in exercise of the powers enabling Her in that behalf, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

Citation and commencement.

1.—(1) This Order may be cited as the Fiji Independence Order 1970.

(2) This Order shall be published in the Gazette and shall come into operation on 10th October 1970:

Provided that subsections (2) and (3) of section 4 of this Order shall come into operation forthwith.

Interpretation.

2.—(1) In this Order—

" the Constitution " means the Constitution of Fiji set out in the Schedule to this Order;

" the appointed day " means 10th October 1970;

" the existing Constitution " means the Constitution set out in Schedule 2 to the Fiji (Constitution) Order 1966(**a**) as amended by the Fiji (Constitution) (Amendment) Order 1967(**b**) and the Fiji (Constitution) (Amendment) Order 1970(**c**);

" the existing laws " means any Acts of the Parliament of the United Kingdom, Orders of Her Majesty in Council, Ordinances, rules, regulations, orders or other instruments having effect as part of the law of Fiji immediately before the appointed day but does not include any Order revoked by this Order;

" the existing Legislative Council " means the Legislative Council established by the existing Orders;

" the existing Orders " means the Orders revoked by section 3(1) of this Order.

(2) The provisions of sections 127, 128, 130(2) and 137 of the Constitution shall apply for the purposes of interpreting sections 1 to 16 of this Order and otherwise in relation thereto as they apply for the purpose of interpreting and in relation to the Constitution.

Revocations.

3.—(1) The Fiji (Constitution) Order 1966, the Fiji (Constitution) (Amendment) Order 1967 and the Fiji (Constitution) (Amendment) Order 1970 are revoked.

(**a**) 1966 III, p. 5104. (**b**) 1967 III, p. 5459 (**c**)

(2) The Emergency Powers Order in Council 1939(**a**) and any Order in Council amending that Order shall cease to have effect as part of the law of Fiji on 10th April 1971 or such earlier date as Parliament may prescribe.

Establishment of Constitution.

4.—(1) Subject to the provisions of this Order, the Constitution shall come into effect in Fiji on the appointed day.

(2) The Governor (as defined for the purposes of the existing Constitution) may at any time after this subsection comes into operation exercise any of t' e powers conferred upon the Governor-General by section 5(3) of this Order or section 45(1) or 69(1) of the Constitution, to such extent as may in his opinion be necessary or expedient to enable the Constitution to function as from the appointed day, and if the Governor directs that it is necessary or expedient for that purpose that any selection of persons under section 45(2) of the Constitution should take place before the appointed day that selection may take place accordingly.

(3) For the purposes of the exercise by the Governor under the preceding subsection of the powers conferred by the said section 45(1) the references therein to the Prime Minister and to the Leader of the Opposition shall be construed as if they were references respectively to the Chief Minister and the Leader of the Opposition as defined for the purposes of the existing Constitution.

Existing laws.

5.—(1) The revocation of the existing Orders shall be without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders; and the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Fiji Independence Act 1970(**b**) and this Order.

(2) Where any matter that falls to be prescribed or otherwise provided for under the Constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section) or is otherwise prescribed or provided for immediately before the appointed day by or under the existing Orders that prescription or provision shall, as from that day, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Fiji Independence Act 1970 and this Order) as if it had been made under the Constitution by Parliament or, as the case may require, by the other authority or person.

(3) The Governor-General may, by order published in the Gazette, at any time before 10th April 1971 make such amendments to any existing law (other than the Fiji Independence Act 1970 or this Order) as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling effect to be given to those provisions.

(4) An order made under this section may be amended or revoked by Parliament or, in relation to any existing law affected thereby, by any other authority having power to amend, repeal or revoke that existing law.

(**a**) See S.I. 1952 I, p. 621. (**b**) 1970 c. 50.

(5) It is hereby declared, for the avoidance of doubt, that, save as otherwise provided either expressly or by necessary implication, nothing in this Order shall be construed as affecting the continued operation of any existing law.

(6) The provisions of this section shall be without prejudice to any powers conferred by this Order or any other law upon any person or authority to make provision for any matter, including the amendment or repeal of any existing law.

Parliament.

6.—(1) Notwithstanding anything in section 32 of the Constitution, the House of Representatives shall, until Parliament is first dissolved, consist of thirty-six elected members, and any person who immediately before the appointed day is an elected member of the existing Legislative Council shall on that day become a member of the House of Representatives (whether or not he becomes a citizen of Fiji on that day) and shall be deemed to have complied with the requirements of section 55 of the Constitution and shall hold his seat in the House in accordance with the provisions of the Constitution.

(2) If any vacancy among the members of the House of Representatives exists on the appointed day or occurs between that day and the first dissolution of Parliament the vacancy may be filled by an election held in the like manner as an election to fill that vacancy would have been held if the vacancy had occurred among the members of the existing Legislative Council and the law applicable thereto were (subject to any such modifications, adaptations, qualifications and exceptions as are mentioned in section 5(1) of this Order and to any amendments made under section 5(3) of this Order) that in force immediately before the appointed day:

Provided that the provisions of sections 33, 37 and 44 of the Constitution shall apply, and the provisions of paragraphs (*b*) and (*c*) of section 48(1) and sections 49 and 53 of the existing Constitution shall not apply, in relation to that election.

(3) Any person who immediately before the appointed day holds the office of Speaker or Deputy Speaker of the existing Legislative Council shall on that day become the Speaker or, as the case may be, the Deputy Speaker of the House of Representatives and shall hold his office as such in accordance with the provisions of the Constitution.

(4) Notwithstanding anything in section 46(1) of the Constitution, until Parliament is first dissolved a person shall be qualified to be appointed as a member of the Senate if, and shall not be so qualified unless, he is registered immediately before the appointed day as a voter on one of the rolls referred to in section 47(2) of the existing Constitution and he shall be qualified to be so appointed whether or not he is a citizen of Fiji; but any member of the Senate who is not a citizen of Fiji on the date on which Parliament is first dissolved shall vacate his seat in the Senate on that date.

(5) The standing rules and orders of the existing Legislative Council as in force immediately before the appointed day shall, except as may be otherwise provided under section 54(1) of the Constitution, be the rules of procedure of the House of Representatives and of the Senate, but they shall be construed in relation to

each House of Parliament with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

(6) Any committee of the existing Legislative Council that stands constituted immediately before the appointed day by virtue of any resolution of the Council shall be deemed to have been constituted on that day by resolution of the House of Representatives as a committee of that House; and any elected member of the existing Legislative Council who immediately before the appointed day is a member of any committee of that Council (whether constituted as aforesaid or by the standing rules and orders of the Council) by virtue of any appointment made by the Speaker of the Council shall be deemed to have been appointed on that day to the corresponding committee of the House of Representatives by the Speaker of the House.

(7) Notwithstanding anything in subsection (2), (3) or (4) of section 70 of the Constitution, Parliament shall, unless sooner dissolved, stand dissolved on 11th November 1971:

Provided that, if the Electoral Commission advises the House of Representatives that there is likely to be difficulty in holding the next ensuing general election of members of the House in accordance with any of the provisions of the Constitution or of any other law if Parliament is dissolved not later than 11th November 1971, the House of Representatives may resolve that the provisions of this subsection shall have effect as if there were substituted for that date such other date, not being more than six months thereafter, as may be specified in the resolution; and thereupon this subsection shall have effect accordingly.

(8) Any person who immediately before the appointed day is registered as a voter on one of the rolls referred to in section 47(2) of the existing Constitution shall, subject to the provisions of section 40(2) of the Constitution, be qualified to be registered as mentioned in section 40(1) of the Constitution for the purposes of the first general election of members of the House of Representatives after the appointed day notwithstanding that he is not a citizen of Fiji; but, notwithstanding anything contained in section 32 or 41 of the Constitution, a person who is registered as mentioned in section 40(1) of this Constitution by virtue of the foregoing provisions of this subsection shall not be qualified to be elected as a member of the House of Representatives in that general election or any subsequent election of members of the House or to vote at any such subsequent election unless he has, before the date prescribed for the nomination of candidates or, as the case may be, for polling in the election concerned, become a citizen of Fiji.

(9) Until Parliament is first dissolved, paragraph (*a*) of section 58(2) of the Constitution shall have effect as if the reference therein to seventeen members were a reference to fourteen members.

Ministers.

7.—(1) Any person who immediately before the appointed day holds office as Chief Minister or any other Minister or Assistant Minister under the existing Constitution shall as from that day hold office as Prime Minister or, as the case may be, other Minister or Assistant Minister as if he had been appointed thereto under section 73 or 80 of the Constitution.

(2) Any person holding office as Prime Minister or other Minister by virtue of the preceding subsection who immediately before the appointed day was assigned responsibility for any business of the Government shall be deemed to have been assigned responsibility for such business under section 76 of the Constitution.

(3) Any person who holds office as Prime Minister, other Minister or Assistant Minister by virtue of subsection (1) of this section shall be deemed to have complied with the requirements of section 81 of the Constitution.

Leader of the Opposition.

8. The person who immediately before the appointed day is the Leader of the Opposition (as defined for the purposes of the existing Constitution) shall as from that day hold office as Leader of the Opposition as if he had been appointed thereto under section 86 of the Constitution.

Public officers and members of Service Commissions.

9.—(1) Every person who immediately before the appointed day holds or is acting in a public office shall, as from the appointed day, hold or act in that office or the corresponding public office established by the Constitution as if he had been appointed to do so in accordance with the provisions of the Constitution and shall be deemed to have taken any oaths required upon such appointment by any existing law:

Provided that any person who under the existing Constitution or any existing law would have been required to vacate office at the expiration of any period or on the attainment of any age shall vacate his office under the Constitution upon the expiration of that period or upon the attainment of that age.

(2) The provisions of the preceding subsection shall not apply to any person mentioned in paragraph (*b*)(i) of section 85(1) of the existing Constitution who is serving as a judge of the Court of Appeal immediately before the appointed day.

(3) Until Parliament otherwise prescribes the number of puisne judges of the Supreme Court shall be two.

(4) The provisions of this section shall be without prejudice to any powers conferred by or under the Constitution upon any person or authority to make provision for the abolition of offices and for the removal from office of persons holding or acting in any office.

Legal Proceedings.

10.—(1) All proceedings commenced or pending immediately before the appointed day before the Supreme Court or the Court of Appeal established by the existing Constitution may continue on and after that day before the Supreme Court or the Court of Appeal, as the case may be, established by the Constitution.

(2) Any decision given before the appointed day by the Supreme Court or the Court of Appeal established by the existing Constitution shall, for the purposes of its enforcement or of any appeal therefrom, have effect on and after that day as if it were a decision of the Supreme Court or the Court of Appeal, as the case may be, established by the Constitution.

Jurisdiction of Court of Appeal in relation to Western Pacific.

11.—(1) Unless it is otherwise prescribed by Parliament, the Court of Appeal may exercise on and after the appointed day such jurisdiction and powers in relation to appeals from the High Court of the Western Pacific as may be conferred upon it by or in pursuance of section 19(1) of the Western Pacific (Courts) Order in Council 1961(a) (as amended by the Western Pacific (Courts)

(a) S.I. 1961/1506 (1961 II, p. 3066).

(Amendment) Order 1966(a)) or of any other law in that behalf for the time being in force in any territory in or in relation to which jurisdiction is for the time being exercisable by the said High Court.

(2) The provisions of section 100 of the Constitution shall not apply in relation to decisions of the Court of Appeal given in exercise of any jurisdiction and powers conferred upon it in relation to appeals from the High Court of the Western Pacific, and appeals shall lie to Her Majesty in Council from such decisions in accordance with the Western Pacific (Appeals to Privy Council) Order 1970(b) or any other law for the time being in force in the territories in or in relation to which jurisdiction is for the time being exercisable by the said High Court.

(3) Section 19 of the Western Pacific (Courts) Order in Council 1961, as amended, shall cease to form part of the law of Fiji with effect from the appointed day.

Magistrates' courts and magistrates.

12.—(1) Any person who immediately before the appointed day is a person appointed to hold a magistrate's court of the first, second or third class, shall, as from that day, hold the office of first, second, or third class magistrate, respectively, (which offices are hereby constituted and established), and accordingly as from the appointed day—

(*a*) the jurisdiction and powers under any existing law of persons appointed to hold magistrate's courts of the first, second or third class, or of magistrates' courts of such classes, shall vest in the offices of first, second or third class magistrate, respectively, as constituted and established as aforesaid:

Provided that a person who holds or is acting in the office of senior magistrate immediately before that day shall have and exercise all the powers and jurisdiction conferred upon a first class magistrate by the provisions of this subsection;

(*b*) references to persons holding the office of first, second or third class magistrate, or to magistrates courts of the first, second or third class, in any existing law, or in any instrument, document or legal proceedings subsisting or continuing upon the appointed day, shall be construed as references to first, second or third class magistrates, respectively.

(2) The terms of service which apply immediately before the appointed day to a person appointed to hold a magistrate's court of the first, second or third class shall apply to such person in respect of his tenure of the office of a first, second or third class magistrate by virtue of the provisions of the preceding subsection.

Transitional provisions relating to Commissions.

13.—(1) Any person who immediately before the appointed day holds or is acting in any office to which this subsection applies shall, as from the appointed day, hold or act in the corresponding office established by the Constitution as if he had been appointed to do so in accordance with the provisions of the Constitution:

Provided that any such person who under the provisions of the existing Orders would have been required to vacate his office on the expiration of any period or at any other time specified in the instrument by which he was appointed shall vacate his office at the expiration of that period or at that time.

(a) S.I. 1966/1183 (1966 III, p. 3071). (b) S.I. 1970/

(2) A person shall become and continue to be the holder of the corresponding office by virtue of the preceding subsection, and may be re-appointed under the Constitution to that office at any time, notwithstanding that circumstances exist on the appointed day and continue to exist thereafter that under the Constitution would cause him to be disqualified for appointment to that office if the office to which that office corresponds was held by that person on 10th July 1970 and the like circumstances existed on that date.

(3) Subsection (1) of this section applies to the office of appointed member of the Judicial and Legal Services Commission established by the existing Constitution and to the office of any member of the Public Service Commission or the Police Service Commission established by that Constitution.

(4) Any power that, immediately before the appointed day, is vested in a Commission established by Chapter VII of the existing Constitution and that under that Constitution is then delegated to some other person or authority shall be deemed to have been delegated to that person or authority on the appointed day in accordance with the provisions of the Constitution; and any proceedings commenced or pending before any such Commission immediately before the appointed day may be carried on before the corresponding Commission established by Chapter VIII of the Constitution.

(5) The references to the House of Representatives in sections 38(3), 101(3), 104(2) and 106(2) of the Constitution shall, until the expiration of five years from the appointed day in the case of section 38(3) and of three years from that day in any other case, be construed as including references to the existing Legislative Council.

Compulsory retirement to facilitate appointment of local candidates.

14.—(1) If the Prime Minister so requests, the Commission or other authority or person having power to make appointments in any branch of the public service (in this subsection referred to as "the appointing authority") shall consider whether there are more local candidates suitably qualified for appointment to, or promotion in, that branch than there are vacancies in that branch that could appropriately be filled by such local candidates; and the appointing authority, if satisfied that such is the case, shall, if so requested by the Prime Minister, select officers in that branch to whom this section applies and whose retirement would in the opinion of the appointing authority cause vacancies that could appropriately be filled by such suitably qualified local candidates as are available and fit for appointment and inform the Prime Minister of the number of officers so selected; and if the Prime Minister specifies a number of officers to be called upon to retire (not exceeding the number of officers so selected) the appointing authority shall nominate that number of officers from among the officers so selected and by notice in writing require them to retire from the public service; and any officer who is so required to retire shall, notwithstanding any provision of the Constitution, retire accordingly.

(2) A notice given under this section requiring an officer to retire from the public service shall be not less than six months from the date he receives the notice, at the expiration of which he shall proceed on leave of absence pending retirement:

Provided that, with the agreement of the officer or if the officer is on leave when it is given, a notice may specify a shorter period.

(3) This section applies to any officer who is the holder of a pensionable office in the public service and is a designated officer for the purposes of the Overseas Service (Fiji) Agreement 1961.

(4) Any notice given or other thing done under section 94A of the existing Constitution shall, as from the appointed day, have effect as if it had been given or done under this section.

Appeals in respect of certain decisions affecting pensions benefits.

15.—(1) The provisions of this section shall have effect for the purpose of enabling an officer to whom this section applies or his personal representatives to appeal against any of the following decisions, that is to say:—

(*a*) a decision of the appropriate Commission to give such concurrence as is required by subsection (1) or (2) of section 111 of the Constitution in relation to the refusal, withholding, reduction in amount or suspending of any pensions benefits in respect of such an officer's service as a public officer;

(*b*) a decision of any authority to remove such an officer from office if the consequence of the removal is that any pensions benefits cannot be granted in respect of the officer's service as a public officer; or

(*c*) a decision of any authority to take some other disciplinary action in relation to such an officer if the consequence of the action is, or in the opinion of the authority might be, to reduce the amount of any pensions benefits that may be granted in respect of the officer's service as a public officer.

(2) Where any such decision as is referred to in the preceding subsection is taken by any authority, the authority shall cause to be delivered to the officer concerned, or to his personal representatives, a written notice of that decision stating the time, not being less than twenty-eight days from the date on which the notice is delivered, within which he, or his personal representatives, may apply to the authority for the case to be referred to an Appeals Board.

(3) If application is duly made within the time stated in the notice, the authority shall notify the Prime Minister in writing of that application and the Prime Minister shall thereupon appoint an Appeals Board consisting of—

(*a*) one member selected by the Prime Minister;

(*b*) one member selected by an association representative of public officers or a professional body, nominated in either case by the applicant; and

(*c*) one member selected by the two other members jointly (or, in default of agreement between those members, by the Judicial and Legal Services Commission) who shall be the chairman of the Board.

(4) The Appeals Board shall enquire into the facts of the case, and for that purpose—

(*a*) shall, if the applicant so requests in writing, hear the applicant either in person or by a legal representative of his choice, according to the terms of the request, and shall consider any representations that he wishes to make in writing;

(*b*) may hear any other person who, in the opinion of the Board, is able to give the Board information on the case; and

(*c*) shall have access to, and shall consider, all documents that were available to the authority concerned and shall also consider any further document relating to the case that may be produced by or on behalf of the applicant or the authority.

(5) When the Appeals Board has completed its consideration of the case, then—

(*a*) if the decision that is the subject of the reference to the Board is such a decision as is mentioned in paragraph (*a*) of subsection (1) of this section the Board shall advise the appropriate Commission whether the decision should be affirmed, reversed or modified and the Commission shall act in accordance with that advice; and

(*b*) if the decision that is the subject of the reference to the Board is such a decision as is referred to in paragraph (*b*) or paragraph (*c*) of subsection (1) of this section, the Board shall not have power to advise the authority concerned to affirm, reverse or modify the decision but—

(i) where the officer has been removed from office the Board may direct that there shall be granted all or any part of the pensions benefits that, under any law, might have been granted in respect of his service as a public officer if he had retired voluntarily at the date of his removal and may direct that any law with respect to pensions benefits shall in any other respect that the Board may specify have effect as if he had so retired; and

(ii) where some other disciplinary action has been taken in relation to the officer the Board may direct that, on the grant of any pensions benefits under any law in respect of the officer's service as a public officer, those benefits shall be increased by such amount or shall be calculated in such manner as the Board may specify in order to offset all or any part of the reduction in the amount of those benefits that, in the opinion of the Board, would or might otherwise be a consequence of the disciplinary action,

and any direction given by the Board under this paragraph shall be complied with notwithstanding the provisions of any other law.

(6) The provisions of subsections (1), (2), (3) and (4) of section 135 of the Constitution shall apply with the necessary modifications in relation to an Appeals Board established under this section as they apply in relation to a Commission established by the Constitution.

(7) In this section—

" pensions benefits " has the meaning assigned to that expression in section 110 of the Constitution; and

" legal representative " means a person lawfully in or entitled to be in Fiji and entitled to practise in Fiji as a barrister and solicitor.

(8) This section applies to an officer who is the holder of a pensionable office in the public service and—

(*a*) who is a member of Her Majesty's Overseas Civil Service or of Her Majesty's Overseas Judiciary;

(*b*) who has been designated for the purposes of the Overseas Service (Fiji) Agreement 1961; or

(*c*) who was selected for appointment to any office in the public service, or whose appointment to any such office was approved, by a Secretary of State.

(9) This section also applies to any officer who is employed as a public officer on contract and who has been designated for the purposes of the Overseas Service (Fiji) Agreement 1961 or any agreement replacing that agreement; and for the purposes of the application of this section to such an officer—

(*a*) references in this section to pensions benefits shall be construed as including references to any gratuity or other payment to which the officer is entitled under his contract on the expiration of the term of employment for which it provides;

(*b*) references in this section to the grant of such benefits under any law or to any law with respect to pensions benefits shall be construed as including references respectively to the payment of such benefits under that contract and to that contract; and

(*c*) references in this section to the removal of the officer from office and to his voluntary retirement shall be construed as references respectively to the termination of his contract and to the expiration of the term of employment for which it provides.

Alteration of this Order.

16.—(1) Parliament may alter any of the provisions of this Order in the same manner as it may alter any of the provisions of the Constitution not specified in section 67(2) of the Constitution:

Provided that subsections (1), (2) and (7) of section 6, section 9, subsections (1), (2) and (3) of section 13 and this section may be altered by Parliament only in the same manner as the provisions so specified.

(2) Section 67(6) of the Constitution shall apply for the purpose of construing references in this section to any provision of this Order and to the alteration of any such provision as it applies for the purpose of construing references in section 67 of the Constitution to any provision of the Constitution and to the alteration of any such provision.

SCHEDULE TO THE ORDER

THE CONSTITUTION OF FIJI

ARRANGEMENT OF SECTIONS

CHAPTER I

THE STATE AND THE CONSTITUTION

Section
1. The State.
2. Constitution is supreme law.

CHAPTER II

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

3. Fundamental rights and freedoms of the individual.
4. Protection of right to life.
5. Protection of right to personal liberty.
6. Protection from slavery and forced labour.
7. Protection from inhuman treatment.
8. Protection from deprivation of property.
9. Protection for privacy of home and other property.
10. Provisions to secure protection of law.
11. Protection of freedom of conscience.
12. Protection of freedom of expression.
13. Protection of freedom of assembly and association.
14. Protection of freedom of movement.
15. Protection from discrimination on the grounds of race, etc.
16. Protection of persons detained under emergency laws.
17. Enforcement of protective provisions.
18. Interpretation of Chapter II and savings.

CHAPTER III

CITIZENSHIP

19. Persons who become citizens on 10th October 1970.
20. Persons entitled to be registered as citizens.
21. Persons born in Fiji after 9th October 1970.
22. Persons born outside Fiji after 9th October 1970.
23. Marriage to citizen of Fiji.
24. Commonwealth citizens.
25. Powers of Parliament.
26. Interpretation.

CHAPTER IV

THE GOVERNOR-GENERAL

27. Establishment of office of Governor-General.
28. Acting Governor-General.
29. Oaths to be taken by Governor-General.

CHAPTER V

PARLIAMENT

PART 1

Composition of Parliament

Section
30. Establishment of Parliament.

PART 2

The House of Representatives

31. The House of Representatives to consist of elected members.
32. Number and method of election of members.
33. Disqualifications for election as a member.
34. Vacation of seats of members.
35. Vacation of seat on sentence.
36. Speaker and Deputy Speaker.
37. Determination of questions of membership.
38. Constituency Boundaries Commission.
39. Constituencies.
40. Qualifications and disqualifications for registration as a voter.
41. Right to vote at elections.
42. Electoral Commission.
43. Supervisor of Elections.
44. Functions of Electoral Commission and Supervisor of Elections.

PART 3

The Senate

45. Composition of the Senate.
46. Qualifications and disqualifications for membership.
47. Tenure of seats of members.
48. Vacation of seat on sentence.
49. Filling of vacancies in the Senate.
50. President and Vice-President.
51. Determination of questions of membership.

PART 4

Powers and Procedure

52. Power to make laws.
53. Mode of exercise of legislative power.
54. Regulation of procedure in each House.
55. Oath of allegiance.
56. Official language.
57. Presiding.
58. Quorum.

Section

59. Voting.
60. Right of Attorney-General to attend either House.
61. Restrictions with regard to certain financial measures.
62. Limitation on powers of the Senate with respect to appropriation bills.
63. Limitation on powers of the Senate with respect to other money bills.
64. Limitation on powers of the Senate with respect to urgent bills.
65. Limitation on powers of the Senate with respect to other bills.
66. Functions of Speaker.
67. Alteration of Constitution.
68. Alteration of certain laws.

PART 5

Sessions, prorogation and dissolution

69. Sessions of Parliament.
70. Prorogation and dissolution of Parliament.

PART 6

Parliamentary staff

71. Clerks to House of Representatives and the Senate and their staffs.

CHAPTER VI

THE EXECUTIVE

72. Executive authority of Fiji.
73. Ministers.
74. Tenure of office of Ministers.
75. The Cabinet.
76. Assignment of responsibilities to Ministers.
77. Performance of Prime Minister's functions during illness or absence.
78. Exercise of Governor-General's functions.
79. Governor-General to be kept informed.
80. Assistant Ministers.
81. Oaths to be taken by Ministers.
82. Direction, etc. of government departments.
83. Secretary to the Cabinet.
84. Commissioner of Police.
85. Director of Public Prosecutions.
86. Leader of Opposition.
87. Constitution of offices.
88. Prerogative of Mercy.

CHAPTER VII

THE JUDICATURE

PART 1

The Supreme Court

Section

89. Establishment of Supreme Court.
90. Appointment of judges of Supreme Court.
91. Tenure of office of judges of Supreme Court.
92. Oaths to be taken by judges of Supreme Court.

PART 2

The Court of Appeal

93. Establishment of Court of Appeal.
94. Composition of Court of Appeal.
95. Tenure of office of judges of Court of Appeal.
96. Oaths to be taken by judges of Court of Appeal.

PART 3

Jurisdiction of the Supreme Court and appeals

97. Original jurisdiction of Supreme Court in constitutional questions.
98. Supreme Court and subordinate courts.
99. Appeals to Court of Appeal.
100. Appeals to Her Majesty in Council.

CHAPTER VIII

SERVICE COMMISSIONS AND THE PUBLIC SERVICE

101. Judicial and Legal Services Commission.
102. Appointment, etc., of judicial and legal officers.
103. Appointments, etc., of principal representatives of Fiji abroad and appointment on transfer of certain other officers.
104. Public Service Commission.
105. Appointment, etc., of public officers.
106. Police Service Commission.
107. Appointment, etc., of members of the Police Force.
108. Removal from office of members of Commissions.
109. Tenure of office of Supervisor of Elections, Director of Public Prosecutions and Auditor-General.
110. Pensions laws and protection of pension rights.
111. Power of Commissions in relation to pensions, etc.

CHAPTER IX

THE OMBUDSMAN

112. Office of Ombudsman.
113. Investigations by Ombudsman.
114. Procedure in respect of investigations.
115. Disclosure of information, etc.
116. Proceedings after investigation.
117. Discharge of functions of Ombudsman.
118. Supplementary and ancillary provision.

CHAPTER X

FINANCE

119. Consolidated Fund.
120. Withdrawals from Consolidated Fund or other public funds.
121. Authorisation of expenditure.
122. Authorisation of expenditure in advance of appropriation.
123. Contingencies Fund.
124. Remuneration of certain officers.
125. Public debt.
126. Auditor-General.

CHAPTER XI

MISCELLANEOUS

127. Interpretation.
128. References to public office, etc.
129. Appointments to certain offices for terms of years.
130. Powers of appointment and acting appointments.
131. Reappointments and concurrent appointments.
132. Removal from office.
133. Resignations.
134. Meaning of " Fijian " and " Indian ".
135. Performance of functions of Commissions and tribunals.
136. Saving for jurisdiction of courts.
137. Power to amend and revoke instruments, etc.
138. Consultation.

SCHEDULE 1 TO THE CONSTITUTION
OATHS AND AFFIRMATIONS

SCHEDULE 2 TO THE CONSTITUTION

ALTERATIONS TO THE PROVISIONS OF THE CONSTITUTION RELATING TO THE JUDGES OF THE COURT OF APPEAL

SCHEDULE 3 TO THE CONSTITUTION

OFFICES TO WHICH SECTION 102 APPLIES

THE CONSTITUTION OF FIJI

Whereas on 10th October 1874 Cakobau, styled Tui Viti and Vunivalu, and other High Chiefs signified their loyalty to Her Most Gracious Majesy Queen Victoria and their dedication to God and to the rule of law by the solemn agreement known as the Deed of Cession made and concluded by them of the one part and Sir Hercules George Robert Robinson, the representative of Her Majesty, of the other part:

And Whereas in November 1879 the Chiefs of Rotuma similarly signified adherence to such principles by the Deed of Rotuma Cession:

And whereas many persons of all races and creeds have come from divers countries and have desired peace and prosperity under the precepts and principles of such Cessions:

And Whereas all the peoples of Fiji have ever since acknowledged their allegiance to the Crown and their reverence for God and the rights and freedoms of the individual secured and safeguarded by adherence to the rule of law:

And Whereas those peoples have become united under a common bond, have progressively advanced economically and politically and have broadened their rights and freedoms in accordance with the dignity of the human person and the position of the family in a society of free men and free institutions:

Now, therefore, the people of Fiji do affirm their allegiance to Her Most Excellent Majesty Queen Elizabeth II, Her heirs and successors, their reverence for God and their unshakeable belief that all are entitled to fundamental human rights and freedoms based upon and secured by the rule of law and to that end desire that the following provisions shall take effect as the Constitution of Fiji:—

CHAPTER I

THE STATE AND THE CONSTITUTION

The State.

1. Fiji shall be a sovereign democratic State.

Constitution is supreme law.

2. This Constitution is the supreme law of Fiji and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void.

CHAPTER II

PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

Fundamental rights and freedoms of the individual.

3. Whereas every person in Fiji is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(*a*) life, liberty, security of the person and the protection of the law;

(*b*) freedom of conscience, of expression and of assembly and association; and

(*c*) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.

Protection of right to life.

4.—(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable—

(*a*) for the defence of any person from violence or for the defence of property;

(*b*) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(*c*) for the purpose of suppressing a riot, insurrection or mutiny; or

(*d*) in order to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war.

Protection of right to personal liberty.

5.—(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say—

(*a*) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Fiji or elsewhere, in respect of a criminal offence of which he has been convicted;

(*b*) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;

(*c*) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

(*d*) for the purpose of bringing him before a court in execution of the order of a court;

(*e*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;

(*f*) under the order of a court or with the consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;

(*g*) for the purpose of preventing the spread of an infectious or contagious disease;

(*h*) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(*i*) for the purpose of preventing the unlawful entry of that person into Fiji, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Fiji; or

(*j*) to such extent as may be necessary in the execution of a lawful order requiring that person to remain within a specified area within Fiji or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person with a view to the making of any such order or relating to such an order after it has been made, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Fiji in which, in consequence of any such order, his presence would otherwise be unlawful.

(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained—

(*a*) for the purpose of bringing him before a court in execution of the order of a court; or

(*b*) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence,

and who is not released, shall be afforded reasonable facilities to consult a legal representative of his own choice and shall be brought without undue delay before a court.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection (3)(*b*) of this section is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(6) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person, or from any other person or authority on whose behalf that other person was acting.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period.

Protection from slavery and forced labour.

6.—(1) No person shall be held in slavery or servitude.

(2) No person shall be required to perform forced labour.

(3) For the purposes of this section, the expression "forced labour" does not include—

(*a*) any labour required in consequence of the sentence or order of a court;

(*b*) labour required of any person while he is lawfully detained which, though not required in consequence of the sentence or order of a court, is reasonably necessary in the interests of hygiene or for the maintenance of the place at which he is detained;

(*c*) any labour required of a member of a disciplined force in pursuance of his duties as such or, in the case of a person who has conscientious objections to service as a member of a naval, military or air force, any labour that that person is required by law to perform in place of such service;

(*d*) any labour required during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable, in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with that situation; or

(*e*) any labour reasonably required as part of reasonable and normal communal or other civic obligations.

Protection from inhuman treatment.

7. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

Protection from deprivation of property.

8.—(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except under the authority of a law that—

(*a*) requires the acquiring authority to give reasonable notice of the intention to take possession of, or acquire the interest in or right over, the property to any person owning the property or having any other interest or right therein that would be affected by such taking of possion or acquisition;

(*b*) requires the acquiring authority to apply to the Supreme Court for an order authorising such taking of possession or acquisition or to apply thereto within thirty days of such taking of possession for such an order as aforesaid;

(*c*) requires the Supreme Court not to grant such an order unless it is satisfied that the taking of possession or acquisition is necessary or expedient in the interests

of defence, public safety, public order, public morality, public health, town and country planning or utilisation of any property in such a manner as to promote the public benefit;

(*d*) requires the acquiring authority to pay damages in respect of such taking of possession prior to an application to the Supreme Court when such an order is not granted and requires the prompt payment of adequate compensation for the taking of possession or acquisition where such an order is granted;

(*e*) requires the acquiring authority, if no agreement as to the amount and manner of payment of compensation has been concluded with any claimant to compensation within thirty days of the grant of the order referred to in paragraph (*b*) of this subsection, to apply to the Supreme Court for the determination of those matters in relation to that claimant (including, where necessary, any question as to his entitlement to compensation); and

(*f*) requires the acquiring authority to pay the costs reasonably incurred by any other party in connection with the proceedings before the Supreme Court for any of the aforesaid purposes, including any appeal (not made unreasonably or frivolously) from any decision of that Court or the Court of Appeal given for those purposes.

(2) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section to the extent that the law in question authorises the taking of possession of property compulsorily during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community and makes provision that—

(*a*) requires the acquiring authority promptly to inform any person owning the property of the taking of possession;

(*b*) enables any such person to notify the acquiring authority that he objects to the compulsory possession of the property by that authority;

(*c*) requires the acquiring authority, in the case of any such notification, to apply within thirty days thereafter to an independent and impartial tribunal, appointed by the Chief Justice from among persons who are qualified to practise as barristers and solicitors in Fiji, for a determination of the authority's entitlement to compulsory possession of the property;

(*d*) requires the tribunal to order the acquiring authority to return the possession of the property unless the tribunal is satisfied that its possession by that authority is reasonably justifiable, in the circumstances of the situation existing, for the purpose of dealing with that situation;

(*e*) requires the prompt payment of adequate compensation for the taking of possession; and

(*f*) enables application to be made by any claimant to compensation to the tribunal for the determination of the amount and manner of payment of compensation in relation to that claimant (including, where necessary, any question as to his entitlement to compensation).

(3) No person who is entitled to compensation under this section shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Fiji.

(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the preceding subsection to the extent that the law in question authorises—

(*a*) the attachment, by order of a court, of any amount of compensation to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party; or

(*b*) the imposition of reasonable restrictions on the manner in which any amount of compensation is to be remitted.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

(*a*) to the extent that the law in question makes provision for the taking of possession or acquisition of any property—

(i) in satisfaction of any tax, duty, rate, cess or due;

(ii) by way of penalty for breach of the law, or forfeiture in consequence of a breach of the law;

(iii) as an incident of a grant, lease, tenancy, mortgage, charge, bill of sale, pledge, contract, permission or licence;

(iv) in the execution of judgments or order of a court;

(v) by reason of its being in a dangerous state or injurious to the health of human beings, animals, trees or plants;

(vi) in consequence of any law with respect to the limitation of actions or acquisitive prescription; or

(vii) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or improvement that the owner or occupier of the land has been required, and has without reasonable excuse refused or failed, to carry out)

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or

(*b*) to the extent that the law in question makes provision for the taking of possession or acquisition of any of the following property (including an interest in or right over property), that is to say—

(i) enemy property;

(ii) property of a person who has died or is unable, by reason of legal incapacity, to administer it himself, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;

(iii) property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or

(iv) property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(6) Nothing in this section shall affect the making or operation of any law so far as it provides for the vesting in the Crown of the ownership of underground water or unextracted minerals.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision for the compulsory taking possession of any property or the compulsory acquisition of any interest in or right over property where that property, interest or right is held by a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided from public funds.

(8) For the purposes of subsections (1) and (2) of this section "acquiring authority" means the person or authority intending to take possession of, or acquire the right or interest in, the property compulsorily or who has taken possession of, or acquired the interest or right in, the property compulsorily, as the context may require.

Protection for privacy of home and other property.

9.—(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(*a*) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development and utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;

(*b*) for the purpose of protecting the rights or freedoms of other persons;

(*c*) that authorises an officer or agent of the Government, or of a local authority, or of a body corporate established by law for public purposes, to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority, or body corporate, as the case may be; or

(*d*) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

Provisions to secure protection of law.

10.—(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be given a fair hearing within a reasonable time by an independent and impartial court established by law.

(2) Every person who is charged with a criminal offence—

(*a*) shall be presumed to be innocent until he is proved or has pleaded guilty;

(*b*) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence;

(*c*) shall be given adequate time and facilities for the preparation of his defence;

(*d*) shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense;

(*e*) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution; and

(*f*) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,

and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.

(4) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.

(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.

(6) No person shall be tried for a criminal offence if he shows that he has been granted a pardon, by competent authority, for that offence.

(7) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.

(8) Any court or other authority required or empowered by law to determine the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority the case shall be given a fair hearing within a reasonable time.

(9) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.

(10) Nothing in the preceding subsection shall prevent the court or other authority from excluding from the proceedings (except the announcement of the decision of the court or other authority) persons other than the parties thereto and their legal representatives to such extent as the court or other authority—

(*a*) may by law be empowered so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings, or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings; or

(*b*) may by law be empowered or required to do so in the interests of defence, public safety or public order.

(11) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of—

(*a*) subsection (2)(*a*) of this section to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

(*b*) subsection (2)(*e*) of this section to the extent that the law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds; or

(*c*) subsection (5) of this section to the extent that the law in question authorises a court to try a member of a disciplined force for a criminal offence notwithstanding any trial and conviction or acquittal of that member under the disciplinary law of that force so, however, that any court so trying such a member and convicting him shall, in sentencing him to any punishment, take into account any punishment awarded him under that disciplinary law.

(12) For the purposes of subsection (2) of this section a person who has been served with a summons or other process requiring him to appear at the time and place appointed for his trial and who does not so appear shall be deemed to have consented to the trial taking place in his absence.

Protection of freedom of conscience.

11.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.

(2) Every religious community shall be entitled, at its own expense, to establish and maintain places of education and to manage any place of education which it wholly maintains.

(3) No religious community shall be prevented from providing religious instruction for persons of that community in the course of any education provided by that community, whether or not that community is in receipt of any government subsidy, grant or other form of financial assistance designed to meet, in whole or in part, the cost of such course of education.

(4) Except with his own consent (or, if he is a person who has not attained the age of eighteen years, the consent of his guardian), no person attending any place of education shall be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion which is not his own.

(5) No person shall be compelled to take any oath which is contrary to his religion or belief or to take any oath in a manner which is contrary to his religion or belief.

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that the law in question makes provision—

(*a*) in the interests of defence, public safety, public order, public morality or public health;

(*b*) for the purpose of protecting the rights or freedoms of other persons, including the right to observe and practise any religion without the unsolicited intervention of members of any other religion; or

(*c*) with respect to standards or qualifications to be required in relation to places of education including any instruction (not being religious instruction) given at such places,

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(7) References in this section to a religion shall be construed as including references to a religious denomination, and cognate expressions shall be construed accordingly.

12.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

Protection of freedom of expression.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(*a*) in the interests of defence, public safety, public order, public morality or public health;

(*b*) for the purpose of protecting the reputations, rights or freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, or regulating the technical administration or the technical operation of telephony, telegraphy, posts, wireless broadcasting or television; or

(*c*) for the imposition of restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

13.—(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to trade unions or other associations for the protection of his interests.

Protection of freedom of assembly and association.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(*a*) in the interests of defence, public safety, public order, public morality or public health;

(*b*) for the purpose of protecting the rights or feeedoms of other persons; or

(*c*) for the imposition of restrictions upon public officers, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

14.—(1) No person shall be deprived of his freedom of movement, and for the purposes of this section the said freedom means the right to move freely throughout Fiji, the right to reside in any part of Fiji, the right to enter Fiji, the right to leave Fiji and immunity from explusion from Fiji.

Protection of freedom of movement.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(*a*) for imposing restrictions on the movement or residence within Fiji of any person or on any person's right to leave Fiji that are reasonably required in the interests of defence, public safety or public order;

(*b*) for imposing restrictions on the movement or residence within Fiji or on the right to leave Fiji of persons generally or any class of persons in the interests of defence, public safety, public order, public morality or public health, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic so iety;

(*c*) for imposing restrictions, by order of a court, on the movement or residence within Fiji of any person or on any person's right to leave Fiji either in consequence of his having been found guilty of a criminal offence or for the purpose of ensuring that he appears before a court at a later date for trial for such a criminal offence or for proceedings preliminary to trial or for proceedings relating to his extradition or lawful removal from Fiji;

(*d*) for imposing restrictions on the movement or residence within Fiji of any person who is not a citizen of Fiji or for excluding or expelling any such person from Fiji;

(*e*) for imposing restrictions on the acquisition or use by any person of any property in Fiji;

(*f*) for imposing restrictions on the movement or residence within Fiji or on the right to leave Fiji of any public officer;

(*g*) for the removal of a person from Fiji to be tried or punished in some other country for a criminal offence under the law of that other country or to undergo imprisonment in some other country in execution of the sentence of a court in respect of a criminal offence of which he has been convicted; or

(*h*) for imposing restrictions on the right of any person to leave Fiji that are reasonably required in order to secure the fulfilment of any obligations imposed on that person by law, except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) If any person whose freedom of movement has been restricted by virtue of such a provision as is referred to in paragraph (*a*) of the preceding subsection so requests at any time during the period of that restriction not earlier than three months after the order imposing that restriction was made or three months after he last made such a request, as the case may be, his case shall be reviewed by an independent and impartial tribunal presided over by a person appointed by the Chief Justice from among persons who are qualified to practise as barristers and solicitors in Fiji.

(5) On any review by a tribunal in pursuance of the preceding subsection of the case of any person whose freedom of movement has been restricted, the tribunal may make recommendations concerning the necessity or expediency of continuing that restriction to the authority by whom it was ordered and, unless it is otherwise provided by law, that authority shall be obliged to act in accordance with any such recommendations.

Protection from discrimination on the grounds of race, etc.

15.—(1) Subject to the provisions of this section—

(*a*) no law shall make any provision that is discriminatory either of itself or in its effect; and

(*b*) no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.

(2) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour or creed, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(3) Nothing contained in any law shall be held to be inconsistent with or in contravention of subsection (1)(*a*) of this section to the extent that the law in question makes provision—

(*a*) for the appropriation of revenues or other funds of Fiji;

(*b*) with respect to persons who are not citizens of Fiji;

(*c*) for the application, in the case of persons of any such description as is mentioned in the preceding subsection (or of persons connected with such persons) of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description;

(*d*) for the application of customary law with respect to any matter in the case of persons who, under that law, are subject to that law;

(*e*) whereby persons of any such description as is mentioned in the last foregoing subsection may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society;

(*f*) for standards or qualifications (not being standards or qualifications specifically relating to race, place of origin, political opinions, colour or creed) to be required of any person who is appointed to, or to act in, any public office, any office in the service of a local authority or any officer in a body corporate established by any law for public purposes; or

(*g*) for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period.

(4) Subsection (1)(*b*) of this section shall not apply to—

(*a*) anything that is expressly or by necessary implication authorised to be done by any provision of law that is referred to in the preceding subsection; or

(*b*) the exercise of any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

(5) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section—

(*a*) if the law in question was in force immediately before 23rd September 1966 and has continued in force at all times since that day; or

(*b*) to the extent that it repeals and re-enacts any provision which has been contained in any written law at all time since immediately before that day.

(6) Subject to the provisions of the next following subsection, no person shall be treated in a discriminatory manner in respect of access to shops, hotels, lodging-houses, public restaurants, eating-houses or places of public entertainment or in respect of access to places of public resort maintained wholly or partly out of public funds or dedicated to the use of the general public.

(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (2) of this section may be subjected to any restriction on the rights and freedoms guaranteed by sections 9, 11, 12, 13 and 14 of this Constitution, being such a restriction as is authorised by section 9(2), section 11(5), section 12(2), section 13(2), or section 14(3)(*a*) or (*b*), as the case may be.

Protection of persons detained under emergency laws.

16.—(1) Where a person is detained by virtue of a law that authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period, the following provisions shall apply, that is to say—

(*a*) he shall, as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing, in a language that he understands, specifying in detail the grounds upon which he is detained;

(*b*) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised;

(*c*) not more than one month after the commencement of his detention and thereafter, during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice from among persons qualified to practise as barristers and solicitors in Fiji;

(*d*) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal; and

(*e*) at the hearing of his case by the tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

(2) On any review by a tribunal in pursuance of this section of the case of a detained person, the tribunal may make recommendations concerning the necessity or expediency of continuing his detention to the authority by which it was ordered but, unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations.

(3) Nothing contained in subsection (1)(*d*) or (*e*) of this section shall be construed as entitling a person to legal representation at public expense.

Enforcement of protective provisions.

17.—(1) If any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(*a*) to hear and determine any application made in pursuance of the preceding subsection;

(*b*) to determine any question which is referred to it in pursuance of the next following subsection,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of this Chapter:

Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of this Chapter, the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his judgment, which shall be final, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the Supreme Court in pursuance of the last foregoing subsection, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal to the Court of Appeal or to Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

(5) No appeal shall lie from any determination by the Supreme Court that an application made in pursuance of subsection (1) of this section is merely frivolous or vexatious.

(6) The Supreme Court shall have such powers in addition to those conferred by this section as may be prescribed for the purpose of enabling that court more effectively to exercise the jurisdiction conferred on it by this section.

(7) The Chief Justice may make rules for the purposes of this section with respect to the practice and procedure of the Supreme Court (including rules with respect to the time within which applications may be brought and references shall be made to the Supreme Court).

Interpretation of Chapter II and savings.

18.—(1) In this Chapter, unless the context otherwise requires—

" contravention ", in relation to any requirement, includes a failure to comply with that requirement and cognate expressions shall be construed accordingly;

" court " means any court of law having jurisdiction in Fiji, including Her Majesty in Council, but excepting, save in sections 4 and 6 of this Constitution, a court established by a disciplinary law;

" criminal offence " means a criminal offence under the law of Fiji;

" legal representative " means a person lawfully in or entitled to be in Fiji and entitled to practise in Fiji as a barrister and solicitor;

" member ", in relation to a disciplined force, includes any person who, under the law regulating the discipline of that force, is subject to that discipline.

(2) Nothing contained in sections 12, 13 or 14 of this Constitution shall be construed as precluding the inclusion in the terms and conditions of service of public officers of reasonable requirements as to their communication or association with other persons or as to their movements or residence.

(3) In relation to any person who is a member of a disciplined force of Fiji, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter other than sections 4, 6 and 7.

(4) In relation to any person who is a member of a disciplined force that is not a disciplined force of Fiji and who is present in Fiji in pursuance of arrangements made between the Government of Fiji and another Government or an international organisation, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter.

(5) No measures taken in relation to a person who is a member of a disciplined force of a country with which Fiji is at war and no law, to the extent that it authorises the taking of any such measures, shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter.

(6) In this Chapter " period of public emergency " means any period during which—

(*a*) Fiji is engaged in any war; or

(*b*) there is in force a proclamation by the Governor-General declaring that a state of public emergency exists.

(7) Without prejudice to the power of the Governor-General to revoke at any time a proclamation made for the purposes of the last foregoing subsection, such a proclamation shall lapse at the

expiration of six months from the date it was made unless it has in the meantime been approved by a resolution of each House of Parliament, and a proclamation that has been so approved shall remain in force so long as those resolutions remain in force and no longer.

(8) A resolution of either House of Parliament passed for the purposes of the preceding subsection shall remain in force for such period not exceeding six months as may be specified therein:

Provided that any such resolution may be extended from time to time by a further such resolution, each extension being for such period not exceeding six months from the date of the resolution effecting the extension as may be specified therein.

CHAPTER III

CITIZENSHIP

Persons who become citizens on 10th October 1970.

19.—(1) Every person who, having been born in Fiji, is on 9th October 1970 a citizen of the United Kingdom and Colonies shall become a citizen of Fiji on 10th October 1970.

(2) Every person who, on 9th October 1970, is a citizen of the United Kingdom and Colonies—

(*a*) having become such a citizen under the British Nationality Act 1948(**a**) by virtue of his having been naturalised by the Governor of the former colony of Fiji as a British subject before that Act came into force;

(*b*) having become such a citizen by virtue of his having been naturalised by the Governor of the former colony of Fiji under that Act; or

(*c*) having become such a citizen by virtue of his having been registered by the Governor of the former colony of Fiji under that Act before 6th May 1970,

shall become a citizen of Fiji on 10th October 1970.

(3) Every person who, having been born outside Fiji, is on 9th October 1970 a citizen of the United Kingdom and Colonies shall, if his father becomes, or would but for his death have become, a citizen of Fiji by virtue of subsection (1) or subsection (2) of this section, become a citizen of Fiji on 10th October 1970.

Persons entitled to be registered as citizens.

20.—(1) Any woman who, on 10th October 1970, is or has been married to a person—

(*a*) who becomes a citizen of Fiji by virtue of the preceding section; or

(*b*) who, having died before 10th October 1970 would, but for his death, have become a citizen of Fiji by virtue of that section,

shall be entitled, upon making application and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Fiji:

Provided that, in the case of any woman who on 10th October 1970 is not a citizen of the United Kingdom and Colonies, the right to be registered as a citizen of Fiji under this subsection shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

(2) Any person who is a Commonwealth citizen (otherwise than by virtue of being a citizen of Fiji) and who immediately before 10th October 1970 was a person deemed to belong to Fiji for the purposes of Chapter I of the Constitution set out in schedule 2 to the Fiji (Constitution) Order 1966 by virtue of such residence in Fiji as is mentioned in paragraph (*b*) of section 16(3) of that Constitution may, at any time before 10th October 1972, apply to be registered as a citizen of Fiji; and any person who applies under this subsection shall be entitled to be registered as such a citizen:

Provided that a person who, at the time of his application, is a citizen of any country to which section 24 of this Constitution applies and has attained the age of twenty-one years shall not be

(**a**) 1948 c. 56.

registered as a citizen of Fiji under this subsection unless he has renounced his citizenship of that country or, if the law of that country does not permit him to renounce his citizenship thereof, has made such declaration as may be prescribed.

(3) Any application for registration under this section shall be made in such manner as may be prescribed as respects that application:

Provided that such an application may not be made by a person who has not attained the age of twenty-one years and is not a woman who is or has been married but shall be made on behalf of that person by a parent or guardian of that person.

Persons born in Fiji after 9th October 1970.

21. Every person born in Fiji after 9th October 1970 shall become a citizen of Fiji at the date of his birth:

Provided that a person shall not become a citizen of Fiji by virtue of this section if at the time of his birth—

(*a*) his father possesses such immunity from suit and legal process as is accorded to an envoy of a foreign sovereign power accredited to Fiji and neither of his parents is a citizen of Fiji; or

(*b*) his father is an enemy alien and the birth occurs in a place then under occupation by the enemy.

Persons born outside Fiji after 9th October 1970.

22. A person born outside Fiji after 9th October 1970 shall become a citizen of Fiji at the date of his birth if at that date his father is a citizen of Fiji otherwise than by virtue of this section or section 19(3) of this Constitution.

Marriage to citizen of Fiji.

23. Any woman who after 9th October 1970 marries a person who is or becomes a citizen of Fiji shall be entitled, upon making application in such manner as may be prescribed and, if she is a British protected person or an alien, upon taking the oath of allegiance, to be registered as a citizen of Fiji:

Provided that the right to be registered as a citizen of Fiji under this section shall be subject to such exceptions or qualifications as may be prescribed in the interests of national security or public policy.

Commonwealth citizens.

24.—(1) Every person who under this Constitution or any other law is a citizen of Fiji or under any enactment for the time being in force in any country to which this section applies is a citizen of that country shall, by virtue of that citizenship, have the status of a Commonwealth citizen.

(2) Every person who is a British subject without citizenship under the British Nationality Act 1948, continues to be a British subject under section 2 of that Act or is a British subject under the British Nationality Act 1965(a) shall, by virtue of that status, have the status of a Commonwealth citizen.

(3) Save as may be otherwise provided by Parliament, the countries to which this section applies are the United Kingdom and Colonies, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, Malaysia, Nigeria, Cyprus, Sierra Leone, Tanzania,

---

(a) 1965 c. 34.

Jamaica, Trinidad and Tobago, Uganda, Kenya, Malawi, Malta, Zambia, The Gambia, Singapore, Guyana, Lesotho, Botswana, Barbados, Mauritius, Swaziland, Tonga and Southern Rhodesia.

(4) Parliament may, subject to the provisions of this Constitution, make provision prescribing the rights, privileges, duties and liabilites of persons having the status of Commonwealth citizen.

Powers of Parliament.

25. Parliament may make provision—

(*a*) for the acquisition of citizenship of Fiji by persons who are not eligible or who are no longer eligible to become citizens of Fiji by virtue of the provisions of this Chapter;

(*b*) for depriving of his citizenship of Fiji any person who is a citizen of Fiji otherwise than by virtue of section 19, 20(2), 21 or 22 of the Constitution;

(*c*) for the renunciation by any person of his citizenship of Fiji;

(*d*) for the maintenance of a register of citizens of Fiji who are also citizens of other countries; or

(*e*) for depriving of his citizenship of Fiji any citizen of Fiji who has attained the age of 21 years and who, being a citizen of some other country, has not, within such period as may be prescribed, renounced his citizenship of that other country or, if the law of that other country does not permit him to renounce his citizenship of that other country, made such declaration as may be prescribed.

Interpretation.

26.—(1) In this Chapter—

" alien " means a person who is not a Commonwealth citizen, a British protected person or a citizen of the Republic of Ireland;

" British protected person " means a person who is a British protected person for the purposes of the British Nationality Act 1948.

(2) Any reference in this Chapter to the father of a person shall, in relation to a person born out of wedlock, be construed as a reference to the mother of that person.

(3) For the purposes of this Chapter, a person born aboard a registered ship or aircraft, or aboard an unregistered ship or aircraft of the government of any country, shall be deemed to have been born in the place in which the ship or aircraft was registered or, as the case may be, in that country.

(4) Any reference in this Chapter to the national status of the father of a person at the time of that person's birth shall, in relation to a person born after the death of his father, be construed as a reference to the national status of the father at the time of the father's death; and where that death occurred before 10th October 1970 and the birth occurred after 9th October 1970 the national status that the father would have had if he had died on 10th October 1970 shall be deemed to be his national status at the time of his death.

CHAPTER IV

THE GOVERNOR-GENERAL

27. There shall be a Governor-General and Commander-in-Chief of Fiji who shall be appointed by Her Majesty and shall hold office during Her Majesty's pleasure and who shall be Her Majesty's representative in Fiji.

Establishment of office of Governor-General.

28. Whenever the office of Governor-General is vacant or the holder of the office is absent from Fiji or is for any other reason unable to perform the functions of his office, those functions shall be performed by such person as Her Majesty may appoint or, if there is no such person in Fiji so appointed and able to perform those functions, by the Chief Justice.

Acting Governor-General.

29. A person appointed to the office of Governor-General or assuming the functions of that office under the preceding section shall, before entering upon the duties of that office, take and subscribe the oath of allegiance and the oath of office as prescribed by schedule 1 to this Constitution, such oaths being administered by the Chief Justice or such other judge of the Supreme Court as may be designated by the Chief Justice.

Oaths to be taken by Governor-General.

CHAPTER V

PARLIAMENT

PART 1

Composition of Parliament

Establishment of Parliament.

30. There shall be a Parliament for Fiji which shall consist of Her Majesty, a House of Representatives and a Senate.

PART 2

The House of Representatives

The House of Representatives to consist of elected members.

31. The House of Representatives shall consist of persons elected in accordance with the provisions of this Constitution and, subject thereto, in such manner as may be prescribed.

Number and method of election of members.

32.—(1) There shall be fifty-two members of the House of Representatives and they shall be elected to represent constituencies.

(2) For the purpose of electing the members of the House, voters shall be registered on one of three separate rolls, that is to say—

(*a*) a roll of voters who are Fijians;

(*b*) a roll of voters who are Indians; and

(*c*) a roll of voters who are neither Fijians nor Indians;

and all voters so registered shall also be registered on one additional roll (in this Constitution referred to as "the national roll").

(3) Twenty-two members of the House shall be elected from among persons who are registered on the roll of voters who are Fijians, and of those members—

(*a*) twelve shall be elected by voters registered on that roll; and

(*b*) ten shall be elected by voters registered on the national roll.

(4) Twenty-two members of the House shall be elected from among persons who are registered on the roll of voters who are Indians, and of those members—

(*a*) twelve shall be elected by voters registered on that roll; and

(*b*) ten shall be elected by voters registered on the national roll.

(5) Eight members of the House shall be elected from among persons who are registered on the roll of voters who are neither Fijians nor Indians, and of those members—

(*a*) three shall be elected by voters registered on that roll; and

(*b*) five shall be elected by voters registered on the national roll.

Disqualifications for election as a member.

33.—(1) No person shall be qualified to be elected as a member of the House of Representatives who—

(*a*) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a power or state outside the Commonwealth;

(*b*) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in any part of the Commonwealth;

(*c*) is, under any law in force in Fiji, adjudged or otherwise declared to be of unsound mind;

(*d*) is under sentence of death imposed on him by a court in any part of the Commonwealth, or is under a sentence of imprisonment (by whatever name called) for a term exceeding twelve months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court;

(*e*) is disqualified for membership of the House under any law in force in Fiji relating to offences connected with elections;

(*f*) subject to any exceptions prescribed by Parliament, holds or is acting in any public office;

(*g*) has at any time during the immediately preceding three years held or acted in the office of a member of the Constituency Boundaries Commission, the Electoral Commission, the Judicial and Legal Services Commission, the Public Service Commission or the Police Service Commission or the office of Supervisor of Elections or Ombudsman;

(*h*) subject to any exceptions or limitations prescribed by Parliament, has any such interest in any such government contract as may be so prescribed; or

(*i*) holds or is acting in an office the functions of which involve any responsibility for, or in connection with, the conduct of any election to the House.

(2) For the purposes of paragraph (*d*) of the preceding subsection—

(*a*) two or more terms of imprisonment that are required to be served consecutively shall be regarded as a single term of imprisonment for the aggregate period of those terms; and

(*b*) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

(3) In paragraph (*h*) of subsection (1) of this section "government contract" means any contract made with the Government or with a department of the Government or with an officer of the Government contracting as such.

Vacation of seats of members.

34.—(1) A member of the House of Representatives shall vacate his seat therein—

(*a*) upon a dissolution of Parliament;

(*b*) if he ceases to be a citizen of Fiji;

(*c*) if he is absent from three consecutive meetings of the House without having obtained from the Speaker (or, if the office of Speaker is vacant or he is for any reason unable to perform the functions of his office, the Deputy Speaker) before the termination of any of those meetings permission to be or to remain absent from that meeting;

(*d*) if any circumstances arise that, if he were not a member of the House, would cause him to be disqualified for election thereto by virtue of paragraphs (*a*), (*b*), (*c*), (*e*), (*f*), (*h*) or (*i*) of subsection (1) of the preceding section.

(2) A member of the House may resign his seat therein by writing under his hand addressed to the Speaker and the seat shall become vacant when the writing is received by the Speaker or, if the office of Speaker is vacant or the Speaker is for any reason unable to perform the functions of his office, by the Deputy Speaker or such other person as may be specified in the rules of procedure of the House.

(3) For the purposes of paragraph (*c*) of subsection (1) of this section, " meeting " means the sittings of the House commencing when it first meets after being summoned at any time or after an adjournement *sine die* and terminating when it is adjourned *sine die* or at the conclusion of a session of Parliament.

Vacation of seat on sentence.

35.—(1) Subject to the provisions of this section, if a member of the House of Representatives is sentenced by a court in any part of the Commonwealth to death or to imprisonment (by whatever name called) for a term exceeding twelve months, he shall forthwith cease to perform his functions as a member of the House and his seat in the House shall become vacant at the expiration of a period of thirty days thereafter:

Provided that the Speaker (or, if the office of Speaker is vacant or he is for any reason unable to perform the functions of his office, the Deputy Speaker) may, at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue any appeal in respect of his conviction or sentence, so however that extensions of time exceeding in the aggregate three hundred and thirty days shall not be granted without the approval of the House signified by resolution.

(2) If at any time before the member vacates his seat he receives a free pardon or his conviction is set aside or his sentence is reduced to a term of imprisonment of less than twelve months or a punishment other than imprisonment is substituted, his seat in the House shall not become vacant under the provisions of this section, and he may again perform his functions as a member of the House.

(3) Paragraphs (*a*) and (*b*) of section 33(2) of this Constitution shall apply for the purposes of this section as they apply for the purposes of paragraph (*d*) of section 33(1).

Speaker and Deputy Speaker.

36.—(1) The House of Representatives shall at its first sitting after any general election elect from among its members a Speaker and a Deputy Speaker.

(2) A member of the House shall not be qualified for election as Speaker or Deputy Speaker if he is a Minister or an Assistant Minister.

(3) The office of the Speaker or the Deputy Speaker shall become vacant—

(*a*) if he ceases to be a member of the House otherwise than by reason of a dissolution of Parliament;

(*b*) if, under the provisions of the preceding section, he is required to cease to perform his functions as a member of the House;

(*c*) if he becomes a Minister or an Assistant Minister;

(*d*) if the House passes a resolution supported by the votes of not less than two-thirds of all the members thereof requiring his removal from office; or

(*e*) in the case of the Deputy Speaker, if he is elected as Speaker.

(4) A person holding the office of Speaker or Deputy Speaker may resign his office by writing under his hand addressed to the House and the office shall become vacant when the writing is received by the Clerk to the House.

(5) The office of the Speaker shall also become vacant when the House first sits after any general election; and the office of the Deputy Speaker shall also become vacant on a dissolution of Parliament.

(6) If the office of Speaker or Deputy Speaker becomes vacant under subsection (3) or (4) of this section the House shall, unless Parliament is sooner dissolved, elect one of its members to fill the vacancy at its next sitting after the occurrence of the vacancy or, in the case of the the Deputy Speaker, as soon as practicable thereafter.

(7) No business shall be transacted in the House (other than the election of a Speaker) at any time when the office of Speaker is vacant.

Determination of questions of membership.

37.—(1) The Supreme Court shall have jurisdiction to hear and determine any question whether—

(*a*) any person has been validly elected as a member of the House of Representatives;

(*b*) any member of the House has vacated his seat or is required, under the provisions of section 35 of this Constitution, to cease to perform his functions as member of the House.

(2) An application for the determination of any question under the preceding subsection may be made by any person registered as a voter for the purpose of electing members of the House or by the Attorney-General; and, if any such application is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(3) A determination by the Supreme Court in proceedings under this section shall not be subject to an appeal.

(4) In the exercise of his functions under this section, the Attorney-General shall not be subject to the direction or control of any other person or authority.

Constituency Boundaries Commission.

38.—(1) There shall be a Constituency Boundaries Commission consisting of a Chairman and two other members appointed by the Governor-General acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.

(2) A person shall not be qualified to be appointed as the Chairman of the Commission unless he holds or has held high judicial office in some part of the Commonwealth.

(3) A person shall not be qualified to be appointed as a member of the Commission if he is, or has at any time during the five years preceding his appointment been—

(*a*) a member of the House of Representatives, a member of the Senate or an elected member of any local authority;

(*b*) nominated with his consent as a candidate for election as a member of the House of Representatives or any local authority;

(*c*) the holder of an office (not being an office the functions of which relate only to a part of Fiji) in any political organisation that sponsors or otherwise supports or has during the said period of five years sponsored or otherwise supported a candidate for election as a member of the House of Representatives;

or if he is a public officer or a local government officer.

(4) Subject to the provisions of the next following subsection, a member of the Commission shall vacate his office—

(*a*) at the expiration of five years from the date of his appointment; or

(*b*) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment as such.

(5) The provisions of section 108 of this Constitution shall apply to a member of the Constituency Boundaries Commission as they apply to the appointed member of the Judicial and Legal Services Commission except that subsection (7)(*a*) shall apply as if for the words " in accordance with the advice of the Chief Justice " there were substituted the words " in his own deliberate judgment ".

Constituencies

39.—(1) Subject to the provisions of this section, the boundaries of constituencies for the purpose of the election of members of the House of Representatives shall be such as may be prescribed by order made by the Constituency Boundaries Commission.

(2) Fiji shall be divided—

(*a*) into twelve constituencies each returning one of the members referred to in paragraph (*a*) of section 32 (3) of this Constitution;

(*b*) into twelve constituencies each returning one of the members referred to in paragraph (*a*) of section 32(4) of this Constitution;

(*c*) into three constituencies each returning one of the members referred to in paragraph (*a*) of section 32(5) of this Constitution;

(*d*) into ten constituencies each returning one of the members referred to in paragraph (*b*) of section 32(3) and one of the members referred to in paragraph (*b*) of section 32(4) of this Constitution; and

(*e*) into five constituencies each of which shall consist of two of the constituencies referred to in the last foregoing paragraph and shall return one of the members referred to in paragraph (*b*) of section 32(5) of this Constitution.

(3) When the Constituency Boundaries Commission prescribes the boundaries of the constituencies or, following a review of those boundaries, prescribes new boundaries for any constituencies, it shall do so in such a manner that—

(*a*) the constituencies referred to in paragraph (*a*) of the preceding subsection contain as nearly equal numbers of adult Fijian inhabitants;

(*b*) the constituencies referred to in paragraph (*b*) of that subsection contain as nearly equal numbers of adult Indian inhabitants;

(*c*) the constituencies referred to in paragraph (*c*) of that subsection contain as nearly equal numbers of adult inhabitants who are neither Fijians nor Indians; and

(*d*) the constituencies referred to in paragraph (*d*) of that subsection contain as nearly equal numbers of adult inhabitants,

as appears to the Commission to be reasonably practicable:

Provided that the Commission may depart from the foregoing principles to such extent as it considers expedient in order to take account of geographical features, the boundaries of existing administrative and recognised traditional areas, means of communication and density and mobility of populations.

(4) The boundaries of the constituencies shall be prescribed by the Commission as soon as practicable after the commencement of this Constitution; and thereafter the Commission may review the boundaries of the constituencies whenever it considers this to be desirable and shall do so not later than ten years after it first prescribed those boundaries or, as the case may be, last reviewed them.

(5) Every order made by the Commission under this section shall be published in the Gazette and shall take effect for the purpose of elections to the House of Representatives subsequent to the next dissolution of Parliament after it was made.

(6) In subsection (3) of this section " adult " means of or over the age of twenty-one years.

Qualifications and disqualifications for registration as a voter.

40.—(1) Subject to the provisions of the next following subsection, a person shall be qualified to be registered on one of the rolls referred to in paragraphs (*a*), (*b*) and (*c*) of section 32(2) of this Constitution if, and shall not be so qualified unless, he is a citizen of Fiji and has attained the age of twenty-one years.

(2) No person shall be qualified to be so registered who—

(*a*) is, by virtue of his own act, under any acknowledgement of allegiance, obedience or adherence to a power or state outside the Commonwealth;

(*b*) is under sentence of death imposed on him by a court in any part of the Commonwealth, or is under a sentence of imprisonment (by whatever name called) for a term exceeding twelve months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court;

(*c*) is, under any law in force in Fiji, adjudged or otherwise declared to be of unsound mind; or

(*d*) is disqualified for registration as a voter under any law in force in Fiji relating to offences connected with elections.

(3) The allocation of persons qualified to be registered on any roll to any particular constituency for the purpose of being registered as voters in that constituency shall be made in such manner as may be prescribed.

(4) Paragraphs (*a*) and (*b*) of section 33(2) of this Constitution shall apply for the purposes of subsection (1)(*b*) of this section as they apply for the purposes of paragraph (*d*) of section 33(1) of this Constitution.

Right to vote at elections.

41.—(1) Any person who is registered as a voter in any constituency shall be entitled to vote in such manner as may be prescribed at any election for the constituency unless—

(*a*) on the date appointed for polling he is under such a sentence of death or serving such a sentence of imprisonment as is referred to in paragraph (*b*) of section 40(2) of this Constitution or (except in so far as may be otherwise prescribed) he is for any other reason unable to attend in person at the place and time appointed for polling; or

(*b*) he is prohibited from so voting by any law in force in Fiji because he holds or is acting in any office the functions of which involve any responsibility for, or in connection with, the conduct of that election or because he has been convicted of any offence connected with elections.

(2) No person shall vote at any election for any constituency who is not registered as a voter in that constituency.

Electoral Commission.

42.—(1) There shall be an Electoral Commission consisting of a Chairman appointed by the Governor-General acting in accordance with the advice of the Judicial and Legal Services Commission and not less than two nor more than four other members appointed by the Governor-General acting in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.

(2) A person shall not be qualified to be appointed as a member of the Commission if he is a member of the House of Representatives, a member of the Senate, an elected member of any local authority, a candidate for election as a member of the House of Representatives or of a local authority nominated as such with his consent, a public officer or a local government officer.

(3) Subject to the provisions of the next following subsection, a member of the Commission shall vacate his office—

(*a*) at the expiration of five years from the date of his appointment; or

(*b*) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment as such.

(4) The provisions of section 108 of this Constitution shall apply to a member of the Electoral Commission as they apply to the appointed member of the Judicial and Legal Services Commission except that subsection (7)(*a*) shall apply as if for the words " in accordance with the advice of the Chief Justice " there were substituted the words " in his own deliberate judgment ".

Supervisor of Elections.

43.—(1) There shall be a Supervisor of Elections whose office shall be a public office.

(2) Power to make appointments to the office of Supervisor of Elections shall vest in the Judicial and Legal Services Commission:

Provided that the Commission shall not select for appointment to hold that office a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister has agreed that such a person may be so selected.

(3) A person shall not be qualified to hold or act in the office of Supervisor of Elections unless he is qualified to practise as a barrister and solicitor in Fiji.

(4) Without prejudice to the provisions of the next following section, in the exercise of his functions under this Constitution the Supervisor of Elections shall not be subject to the direction or control of any other person or authority.

Functions of Electoral Commission and Supervisor of Elections.

44.—(1) The Electoral Commission shall have general responsibility for, and shall supervise, the registration of votes for the election of members of the House of Representatives and the conduct of elections of such members and the Commission shall have such powers and other functions relating to such registration and such elections as may be prescribed.

(2) The Supervisor of Elections shall have such powers and other functions relating to such registration and elections as may be prescribed; and he shall keep the Electoral Commission fully informed concerning the exercise of his functions and shall have the right to attend meetings of the Commission, and he shall comply with any directions that the Commission may give to him concerning the exercise of his functions:

Provided that the question whether the Supervisor of Elections has acted in accordance with the directions of the Electoral Commission shall not be enquired into in any court of law.

(3) Every proposed bill and every proposed regulation or other instrument having the force of law relating to the registration of voters for the election of members of the House of Representatives or to the election of such members shall be referred to the Electoral Commission and to the Supervisor of Elections at such time as shall give them sufficient opportunity to make comments thereon before the bill is introduced in the House or, as the case may be, the regulation or other instrument is made.

(4) The Electoral Commission may make such reports to the Governor-General concerning the matters under their supervision, or any draft bill or instrument that is referred to them, as they may think fit, and if the Commission so requests in any such report other than a report on a draft bill or instrument that report shall be laid before the House of Representatives.

PART 3

The Senate

Composition of the Senate.

45.—(1) The Senate shall consist of twenty-two members, of whom—

(*a*) eight shall be appointed by the Governor-General acting in accordance with the advice of the Great Council of Chiefs;

(*b*) seven shall be appointed by the Governor-General acting in accordance with the advice of the Prime Minister;

(*c*) six shall be appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition; and

(*d*) one shall be appointed by the Governor-General acting in accordance with the advice of the Council of Rotuma.

(2) In selecting persons for appointment under paragraph (*a*) of the preceding subsection the Great Council of Chiefs shall act in accordance with such procedure as the Great Council may determine; and in selecting a person for appointment under para-

graph (*d*) of that subsection the Council of Rotuma shall act in accordance with such procedure as, subject to any provision in that behalf that may be prescribed by Parliament, the Council of Rotuma may determine.

Qualifications and disqualifications for membership.

46.—(1) Subject to the provisions of the next following subsection, a person shall be qualified to be appointed as a member of the Senate if, and shall not be so qualified unless, he is registered as a voter on one of the three separate rolls referred to in section 32(2) of the Constitution.

(2) No person shall be qualified to be appointed as a member of the Senate who—

(*a*) is a member of the House of Representatives;

(*b*) is, by virtue of his own act, under any acknowledgment of allegiance, obedience or adherence to a power or state outside the Commonwealth;

(*c*) is an undischarged bankrupt, having been adjudged or otherwise declared bankrupt under any law in force in any part of the Commonwealth;

(*d*) is, under any law in force in Fiji, adjudged or otherwise declared to be of unsound mind;

(*e*) is under sentence of death imposed on him by a court in any part of the Commonwealth, or is under a sentence of imprisonment (by whatever name called) for a term exceeding twelve months imposed on him by such a court or substituted by competent authority for some other sentence imposed on him by such a court;

(*f*) is disqualified for membership of the Senate under any law in force in Fiji relating to offences connected with elections;

(*g*) subject to any exceptions prescribed by Parliament, holds or is acting in any public office;

(*h*) has at any time during the immediately preceding three years held or acted in the office of a member of the Constituency Boundaries Commission, the Electoral Commission, the Judicial and Legal Services Commission, the Public Service Commission or the Police Service Commission or the office of Supervisor of Elections or Ombudsman.

(3) For the purposes of paragraph (*e*) of the preceding subsection—

(*a*) two or more terms of imprisonment that are required to be served consecutively shall be regarded as a single term of imprisonment for the aggregate period of those terms; and

(*b*) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of a fine.

Tenure of seats of members.

47.—(1) Subject to the provisions of this section, the term of office of a member of the Senate shall be six years, and his tenure thereof shall not be affected by a dissolution of Parliament:

Provided that the term of office of a member appointed to fill a vacancy occurring because a person has vacated his seat in the Senate for a reason other than the expiration of his term of office shall be the unexpired portion of the term of office of that person.

(2) Of the members of the Senate first appointed, the term of office of—

(*a*) four of those appointed by the Governor-General acting in accordance with the advice of the Great Council of Chiefs, who shall be designated by the Governor-General acting in the same manner at the time of their appointment;

(*b*) three of those appointed by the Governor-General acting in accordance with the advice of the Prime Minister, who shall be designated by the Governor-General acting in the same manner at the time of their appointment;

(*c*) three of those appointed by the Governor-General acting in accordance with the advice of the Leader of the Opposition, who shall be designated by the Governor-General acting in the same manner at the time of their appointment; and

(*d*) the member appointed by the Governor-General acting in accordance with the advice of the Council of Rotuma,

shall be three years.

(3) For the purpose of reckoning the date on which the term of office of a member of the Senate expires—

(*a*) the term of office of the members first appointed shall be deemed to have begun on the date of the commencement of this Constitution; and

(*b*) the term of office of a member appointed to fill a vacancy occurring by reason of the expiration of the term of office of a member shall be deemed to have begun immediately after the expiration of that term.

(4) A member of the Senate shall vacate his seat therein—

(*a*) upon the expiration of his term of office;

(*b*) if he ceases to be a citizen of Fiji;

(*c*) if he is absent from the sittings of the Senate for such period and in such circumstances as may be prescribed in the rules of procedure of the Senate;

(*d*) if any circumstances arise that, if he were not a member of the Senate, would cause him to be disqualified for appointment as such by virtue of paragraphs (*a*), (*b*), (*c*), (*d*), (*f*), or (*g*) of subsection (2) of the preceding section.

(5) A member of the Senate may resign his seat therein by writing under his hand addressed to the President of the Senate and the seat shall become vacant when the writing is received by the President or, if the office of President is vacant or the President is for any reason unable to perform the functions of his office, by the Vice-President or such other person as may be specified in the rules of procedure of the Senate.

Vacation of seat on sentence.

48.—(1) Subject to the provisions of this section, if a member of the Senate is sentenced by a court in any part of the Commonwealth to death or to imprisonment (by whatever name called) for a term exceeding twelve months, he shall forthwith cease to perform his functions as a member of the Senate and his seat in the Senate shall become vacant at the expiration of a period of thirty days thereafter:

Provided that the President of the Senate (or, if the office of President is vacant or he is for any reason unable to perform the functions of his office, the Vice-President) may, at the request of the member, from time to time extend that period for further periods of thirty days to enable the member to pursue any appeal in respect of his conviction or sentence, so however that extensions of time exceeding in the aggregate three hundred and thirty days shall not be granted without the approval of the Senate signified by resolution.

(2) If at any time before the member vacates his seat he receives a free pardon or his conviction is set aside or his sentence is reduced to a term of imprisonment of less than twelve months or a punishment other than imprisonment is substituted, his seat in the Senate shall not become vacant under the provisions of this section, and he may again perform his functions as a member of the Senate.

(3) Paragraphs (*a*) and (*b*) of section 46(3) of this Constitution shall apply for the purposes of this section as they apply for the purposes of paragraph (*e*) of section 46(2).

Filling of vacancies in the Senate.

49. Whenever a member of the Senate vacates his seat therein this vacancy shall be filled as soon as practicable by an appointment under the paragraph of section 45(1) of this Constitution under which that member was appointed:

Provided that no appointment shall be made under paragraph (*b*) or (*c*) of section 45(1)—

(*a*) during any period between a dissolution of Parliament and the next ensuing general election of members of the House of Representatives; or

(*b*) during any period following such an election for which the Governor-General, acting in his own deliberate judgment, may consider it desirable to postpone the making of such an appointment by reason of it appearing to the Governor-General that it is likely to be necessary to make a new appointment to the office of Prime Minister or the office of Leader of the Opposition in consequence of changes in the membership of the House of Representatives resulting from that election.

President and Vice-President.

50.—(1) The Senate shall at its first sitting after the commencement of this Constitution elect from among its members a President and a Vice-President; and whenever the office of President or Vice-President becomes vacant the Senate shall elect one of its members to fill the vacancy at its next sitting after the occurrence of the vacancy or as soon as practicable thereafter.

(2) A member of the Senate shall not be qualified for election as President or Vice-President if he is a Minister or Assistant Minister.

(3) The office of the President or Vice-President shall become vacant—

(*a*) if he ceases to be a member of the Senate;

(*b*) if, under the provisions of section 48 of this Constitution, he is required to cease to perform his functions as a member of the Senate;

(*c*) if he becomes a Minister or an Assistant Minister;

(*d*) if the Senate passes a resolution supported by the votes of not less than two-thirds of all the members thereof requiring his removal from office; or

(*e*) in the case of the Vice-President, if he is elected as President.

(4) A person holding the office of President or Vice-President may resign his office by writing under his hand addressed to the Senate and the office shall become vacant when the writing is received by the Clerk to the Senate.

Determination of questions of membership.

51.—(1) The Supreme Court shall have jurisdiction to hear and determine any question whether—

(*a*) any person has been validly appointed as a member of the Senate;

(*b*) any member of the Senate has vacated his seat or is required, under the provisions of section 48 of this Constitution, to cease to perform his functions as a member of the Senate.

(2) An application for the determination of any question under the preceding subsection may be made by any person registered as a voter for the purpose of electing members of the House of Representatives or by the Attorney-General; and, if any such application is made by a person other than the Attorney-General, the Attorney-General may intervene and may then appear or be represented in the proceedings.

(3) A determination by the Supreme Court in proceedings under this section shall not be subject to an appeal.

(4) In the exercise of his functions under this section, the Attorney-General shall not be subject to the direction or control of any other person or authority.

PART 4

Powers and Procedure

Power to make laws.

52. Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Fiji.

Mode of exercise of legislative power.

53.—(1) The power of Parliament to make laws shall be exercised by bills passed by both Houses of Parliament (or, in the cases mentioned in sections 62, 63, 64 and 65 of this Constitution, by the House of Representatives) and assented to by the Governor-General on behalf of Her Majesty.

(2) A bill may originate only in the House of Representatives.

(3) When a bill has been passed by the House of Representatives it shall be sent to the Senate, and it shall be presented to the Governor-General for assent—

(*a*) when it has been passed by the Senate and agreement has been reached between the two Houses on any amendments made to it by the Senate; or

(*b*) when it is required to be so presented under section 62, 63, 64 or 65 of this Constitution.

(4) When a bill is presented to the Governor-General for assent in pursuance of the preceding subsection he shall signify that he assents or that he withholds assent.

(5) When the Governor-General assents to a bill that has been so presented to him the bill shall become law and the Governor-General shall thereupon cause it to be published in the Gazette as a law.

(6) No law made by Parliament shall come into operation until it has been published in the Gazette but Parliament may postpone the coming into operation of any such law and may make laws with retrospective effect.

(7) All laws made by Parliament shall be styled " Acts of Parliament " and the words of enactment shall be " Enacted by the Parliament of Fiji ".

Regulation of procedure in each House.

54.—(1) Subject to the provisions of this Constitution, each House of Parliament may regulate its own procedure and may make rules for that purpose, including in particular the orderly conduct of its own proceedings.

(2) Each House of Parliament may act notwithstanding any vacancy in its membership (including in the case of the House of Representatives any vacancy not filled when the House first meets after a general election) and the presence or participation of any person not entitled to be present at or participate in the proceedings of the House shall not invalidate those proceedings.

(3) Parliament may, for the purpose of the orderly and effective discharge of the business of the two Houses, make provision for the powers, privileges and immunities of those Houses and the committees and members thereof.

Oath of allegiance.

55. No member of either House of Parliament shall take part in the proceedings of the House, other than the election of the Speaker or President of the House or proceedings necessary for the purposes of this section, until he has made and subscribed before the House the oath of allegiance.

Official language.

56. The official language of Parliament shall be English, but any member of either House may address the chair in the House of which he is a member in Fijian or Hindustani.

Presiding.

57.—(1) The Speaker or in his absence the Deputy Speaker or in their absence a member of the House of Representatives (not being a Minister or Assistant Minister) elected by the House for the sitting shall preside at any sitting of the House.

(2) The President or in his absence the Vice-President or in their absence a member of the Senate (not being a Minister or Assistant Minister) elected by the Senate for the sitting shall preside at any sitting of the Senate.

Quorum.

58.—(1) If at any sitting of either House of Parliament a quorum of the House is not present and any member of the House who is present objects on that account to the transaction of business and, after such interval as may be prescribed by the rules of procedure of the House, the person presiding at the sitting ascertains that a quorum is still not present, he shall adjourn the House.

(2) For the purposes of this section—

(*a*) a quorum of the House of Representatives shall consist of seventeen members in addition to the person presiding; and

(*b*) a quorum of the Senate shall consist of seven members in addition to the person presiding.

59.—(1) Save as otherwise provided in this Constitution, all questions proposed for decision in either House of Parliament shall be determined by a majority of the votes of the members of the House present and voting. **Voting.**

(2) The person presiding in either House of Parliament shall not vote upon any question before the House that falls to be determined by a majority of the members of the House present and voting unless the votes cast are equally divided, in which case he shall exercise a casting vote.

60. The Attorney-General shall be entitled to attend and take part in any proceedings of either House of Parliament notwithstanding that he is not a member of that House and whether or not he is then a member of the other House, but he shall not cast a vote in any proceedings of either House which he attends by virtue of the provisions of this section and shall not be regarded as a member of that House for the purposes of any provision of this Constitution other than sections 54(3) and 56. **Right of Attorney-General to attend either House.**

61.—(1) Except upon the recommendation of the Cabinet signified by a Minister, the House of Representatives shall not— **Restrictions with regard to certain financial measures.**

(*a*) proceed upon any bill (including any amendment to a bill) that, in the opinion of the person presiding, makes provision for any of the following purposes—

(i) the imposition of taxation or the alteration of taxation otherwise than by reduction;

(ii) the imposition of any charge upon the Consolidated Fund or any other public fund of Fiji or the alteration of any such charge otherwise than by reduction;

(iii) the payment, issue or withdrawal from the Consolidated Fund or any other public fund of Fiji of any moneys not charged thereon or any increase in the amount of such payment, issue or withdrawal; or

(iv) the composition or remission of any debt to the Government;

(*b*) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, would be to make provision for any of those purposes.

(2) The Senate shall not—

(*a*) proceed upon any amendment to a bill that, in the opinion of the person presiding, is an amendment that makes provision for any of the following purposes—

(i) the imposition, repeal or alteration of taxation;

(ii) the imposition, repeal or alteration of any charge upon the Consolidated Fund or any other public fund of Fiji;

(iii) the payment, issue or withdrawal from the Consolidated Fund or any other public fund of Fiji of any moneys not charged thereon or any alteration in the amount of such payment, issue or withdrawal;

(iv) the composition or remission of any debt to the Government;

(*b*) proceed upon any amendment to any provision contained in the bill that, in the opinion of the person presiding, is a provision for any of those purposes;

(*c*) proceed upon any motion (including any amendment to a motion) the effect of which, in the opinion of the person presiding, is that provision should be made for any of those purposes.

Limitation on powers of the Senate with respect to appropriation bills.

62.—(1) If a bill that has been passed by the House of Representatives and certified by the Speaker under the next following subsection as an appropriation bill is not passed by the Senate without amendment by the end of the day after the day on which it was sent to the Senate, the bill shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent.

(2) When a bill that in the opinion of the Speaker is an appropriation bill is sent to the Senate from the House of Representatives it shall bear a certificate of the Speaker that it is an appropriation bill.

Limitation on powers of the Senate with respect to other money bills.

63.—(1) Subject to the next following section, if a bill that has been passed by the House of Representatives and certified by the Speaker under the next following subsection as a money bill other than an appropriation bill, having been sent to the Senate at least twenty-one days before the end of the session, is not passed by the Senate without amendment within twenty-one days after the bill was sent to the Senate, the Bill shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent.

(2) When a bill that in the opinion of the Speaker is a money bill other than an appropriation bill is sent to the Senate from the House of Representatives it shall bear a certificate of the Speaker that it is a money bill other than an appropriation bill.

(3) In this section "money bill" means a bill that contains only provisions dealing with all or any of the following matters, that is to say—

(*a*) the imposition, repeal, remission, alteration or regulation of taxation;

(*b*) the imposition of charges on the Consolidated Fund or any other public fund of Fiji or the alteration or repeal of any such charges;

(*c*) the grant of money to the Crown or to any other person or authority or the alteration or revocation of any such grant;

(*d*) the appropriation, receipt, custody, investment, issue or audit of accounts of public money;

(*e*) the raising or guarantee of any loan or the repayment thereof, or the establishment, alteration, administration or abolition of any sinking fund provided in connection with any such loan; or

(*f*) subordinate matters incidental to any of the matters aforesaid:

Provided that the expressions "taxation", "public money" and "loan" do not include any taxation, money or loan raised by local authorities or other local bodies.

64.—(1) If the Governor-General, acting in accordance with the advice of the Prime Minister, by writing under his hand certifies to the President of the Senate that the enactment of a bill that has been passed by the House of Representatives is a matter of urgency and the bill, having been sent to the Senate at least seven days before the end of the session, is not passed by the Senate within seven days after it is so sent or is passed by the Senate with any amendment to which the House of Representatives does not agree within seven days after the bill was sent to the Senate, the bill (with such amendments, if any, as may have been agreed to by both Houses) shall, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent.

Limitation on powers of the Senate with respect to urgent bills.

(2) This section does not apply to any bill for the purposes mentioned in section 67 or 68 of this Constitution.

65.—(1) This section applies to any bill other than—

(*a*) a bill certified under section 62(2), 63(2) or 64(1) of this Constitution; or

(*b*) a bill for the purposes mentioned in section 67 or 68 of this Constitution.

Limitation on powers of the Senate with respect to other bills.

(2) If any bill to which this section applies is passed by the House of Representatives in two successive sessions (whether or not Parliament is dissolved between those sessions) and, having been sent to the Senate in each of those sessions at least one month before the end of the session, is rejected by the Senate in each of those sessions, that bill shall, on its rejection for the second time by the Senate, unless the House of Representatives otherwise resolves, be presented to the Governor-General for assent:

Provided that the foregoing provisions of this subsection shall not have effect unless at least six months have elapsed between the date on which the bill is passed by the House of Representatives in the first session and the date on which it is passed by that House in the second session.

(3) For the purposes of this section, a bill shall be deemed to be rejected by the Senate if it is not passed by the Senate without amendment, or it is passed by the Senate with any amendment which is not agreed to by the House of Representatives.

(4) For the purposes of this section, a bill that is sent to the Senate in any session shall be deemed to be the same bill as a former bill sent to the Senate in the preceding session if, when it is sent to the Senate, it is identical with the former bill or contains only such alterations as are certified by the Speaker to be necessary owing to the time that has elapsed since the date of the former bill or to represent any amendments which have been made by the Senate in the former bill in the preceding session and agreed to by the House of Representatives.

(5) The House of Representatives may, if it thinks fit, on the passage through that House of a bill that is deemed to be the same bill as a former bill sent to the Senate in the preceding session, suggest any amendments without inserting the amendments in the bill, and any such amendments shall be considered by the Senate and, if agreed to by the Senate, shall be treated as amendments made by the Senate and agreed to by the House of Representatives; but the exercise of this power by the House of Representatives shall not affect the operation of this section in the event of the rejection of the bill by the Senate.

(6) There shall be inserted in any bill that is presented to the Governor-General for assent in pursuance of this section any amendments to it that are certified by the Speaker to have been made or recommended by the Senate in the second session and agreed to by the House of Representatives.

Functions of Speaker.

66.—(1) When a bill is presented to the Governor-General for assent in pursuance of the provisions of section 62(1), 63(1), 64(1) or 65 of this Constitution, as the case may be, it shall bear a certificate of the Speaker that those provisions have been complied with.

(2) Whenever the office of Speaker is vacant or the Speaker is for any reason unable to perform any function conferred upon him by this section or by section 62, 63, 64 or 65 of this Constitution, that function may be performed by the Deputy Speaker.

(3) A certificate given by the Speaker or Deputy Speaker under this section shall be conclusive for all purposes and shall not be questioned in any court of law.

Alteration of Constitution.

67.—(1) Subject to the provisions of this section, Parliament may alter this Constitution.

(2) A bill for an Act of Parliament under this section that alters any of the following provisions of this Constitution, that is to say—

(*a*) this section;
(*b*) Chapters I, II and III;
(*c*) Sections 27, 28, 30, 31, 42, 43, 44, 45, 52, 53, 68, 69, 70, 72, 78 and 85;
(*d*) Chapters VII, VIII and IX (including Schedules 2 and 3);
(*e*) Sections 124 and 126; and
(*f*) Chapter XI to the extent that it relates to any of the provisions specified in the preceding paragraphs,

shall not be passed by either House of Parliament unless it is supported at the final voting thereon in the House by the votes of not less than three-quarters of all the members of the House.

(3) A bill for an Act of Parliament under this section that does not alter any of the provisions specified in the preceding subsection shall not be passed by either House of Parliament unless it is supported at the final voting thereon in the House by the votes of not less than two-thirds of all the members of the House.

(4) Notwithstanding anything in the foregoing provisions of this section, Parliament shall not have power to alter sections 32, 38 or 39 of this Constitution until three months after a copy has been laid before each House of Parliament of a report of a Commission appointed on behalf of Her Majesty by the Governor-General at any time after the first general election of members of the House of Representatives held after this Constitution comes into force for the purpose of making recommendations as to the most appropriate method of electing members to, and representing the people of Fiji in, the House of Representatives; and, if Parliament subsequently makes any alteration to section 32, 38 or 39 of this Constitution, subsection (2)(*c*) of this section shall, as from the time the bill making that alteration becomes law, have effect as if sections 32, 38 and 39 were specified therein.

(5) Without prejudice to the provisions of subsection (2) of this section, a bill for an Act of Parliament that alters this subsection or paragraph (*a*) of section 45(1) or section 68(2) of this Constitution

shall not be passed by the Senate unless it is supported at the final voting thereon in the Senate by not less than six of the members of the Senate referred to in paragraph (*a*) of the said section 45(1).

(6) In this section—

(*a*) references to this Constitution or to any particular provision thereof include references to any other law in so far as that law alters the Constitution or, as the case may be, that provision; and

(*b*) references to altering this Constitution or any particular provision thereof include references—

(i) to repealing it, with or without re-enactment thereof or the making of different provision in lieu thereof;

(ii) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise;

(iii) to suspending its operation for any period, or terminating any such suspension; and

(iv) to making any other provision that is repugnant to or otherwise inconsistent with it.

Alteration of certain laws.

68.—(1) A bill for an Act of Parliament that alters any of the provisions of the following laws, that is to say—

(*a*) the Fijian Affairs Ordinance;
(*b*) the Fijian Development Fund Ordinance 1965;
(*c*) the Native Lands Ordinance;
(*d*) the Native Land Trust Ordinance;
(*e*) the Rotuma Ordinance;
(*f*) the Rotuma Lands Ordinance 1959;
(*g*) the Agricultural Landlord and Tenant Ordinance;
(*h*) the Banaban Lands Ordinance; and
(*i*) the Banaban Settlement Ordinance,

shall not be passed by either House of Parliament unless it is supported at the final voting thereon in the House by the votes of not less than three-quarters of all the members of the House.

(2) Without prejudice to the provisions of the preceding subsection, a bill for an Act of Parliament that alters any provision of—

(*a*) the Fijian Affairs Ordinance;
(*b*) the Fijian Development Fund Ordinance 1965;
(*c*) the Native Lands Ordinance;
(*d*) the Native Land Trust Ordinance;
(*e*) the Rotuma Ordinance;
(*f*) the Rotuma Lands Ordinance 1959;
(*g*) the Agricultural Landlord and Tenant Ordinance;
(*h*) the Banaban Lands Ordinance; or
(*i*) the Banaban Settlement Ordinance,

that is a provision that affects Fijian land, customs or customary rights shall not be passed by the Senate unless it is supported at the final voting thereon in the House by the votes of not less than six of the members of the Senate referred to in paragraph (*a*) of section 45(1) of this Constitution.

(3) Subsections (1) and (2) of this section (except for the reference therein to the final voting) shall apply to a resolution of either House of Parliament that by virtue of any Act of Parliament, either of the resolution's own force or in conjunction with a corresponding resolution of the other House, alters any provision referred to in those subsections as those subsections apply to a bill for an Act of Parliament that alters any such provision.

(4) In this section—

(*a*) references to the provisions of any law include references to any other law, whether made before or after the commencement of this Constitution, in so far as that law alters those provisions; and

(*b*) references to altering the provisions of any law include references—

(i) to repealing it with or without re-enactment thereof the making of different provision in lieu thereof;

(ii) to modifying it, whether by omitting or amending any of its provisions or inserting additional provisions in it or otherwise;

(iii) to suspending its operation for any period, or terminating any such suspension; and

(iv) to making any other provision that is repugnant to or otherwise inconsistent with it.

PART 5

Sessions, prorogation and dissolution

Sessions of Parliament.

69.—(1) Each session of Parliament shall be held at such place and commence at such time as the Governor-General may by proclamation appoint.

(2) The time appointed for the commencement of any session of Parliament shall be such that a period exceeding six months does not intervene between the end of one session and the first sitting of Parliament in the next session.

(3) Writs for a general election of members of the House of Representatives shall be issued within sixty days of the date of any dissolution of Parliament and a session of Parliament shall be appointed to commence within thirty days of the date prescribed for polling at any general election.

(4) The Governor-General may exercise his powers under subsection (1) of this section in his own deliberate judgment if he receives a request in writing for the summoning of a session of Parliament from not less than one-quarter of the members of the House of Representatives and he considers that the Government no longer commands the confidence of a majority of the members of that House or that it is necessary for the two Houses of Parliament to consider without delay a matter of public importance.

(5) Subject to the provisions of subsection (1) of this section, the sittings of each House of Parliament shall be held at such time and place as that House may, by its rules of procedure or otherwise, determine.

Prorogation and dissolution of Parliament.

70.—(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may at any time prorogue or dissolve Parliament:

Provided that—

(*a*) if the House of Representatives passes a resolution that it has no confidence in the Government and the Prime Minister does not within three days either resign from his office or advise the Governor-General to dissolve Parliament within seven days or at such later time as the Governor-General, acting in his own deliberate judgment, may consider reasonable, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament;

(*b*) if the office of Prime Minister is vacant and the Governor-General considers that there is no prospect of his being able within a reasonable time to appoint to that office a person who can command the support of a majority of the members of the House of Representatives, the Governor-General, acting in his own deliberate judgment, may dissolve Parliament.

(2) Parliament, unless sooner dissolved, shall continue for five years from the date of the first sitting of Parliament after any general election of members of the House of Representatives and shall then stand dissolved.

(3) At any time when Fiji is at war Parliament may from time to time extend the period of five years specified in the preceding subsection by not more than twelve months at a time:

Provided that the life of Parliament shall not be extended under this subsection for more than five years.

(4) At any time when there is in force under section 18 of this Constitution a proclamation by the Governor-General declaring that a state of public emergency exists Parliament may from time to time extend the period of five years specified in subsection (2) of this section by not more than six months at a time:

Provided that the life of Parliament shall not be extended under this subsection for more than one year.

(5) If, after a dissolution and before the holding of the next following general election of members of the House of Representatives, the Prime Minister advises the Governor-General that, owing to the existence of a state of war or of a state of emergency in Fiji or any part thereof, it is necessary to recall Parliament, the Governor-General shall summon the Parliament that has been dissolved to meet.

(6) Unless the life of Parliament is extended under subsection (3) or subsection (4) of this section, the general election of members of the House of Representatives shall proceed notwithstanding the summoning of Parliament under the preceding subsection and the Parliament that has been recalled shall, if not sooner dissolved, again stand dissolved on the day before the day prescribed for polling at that election.

PART 6

Parliamentary staff

Clerks to House of Representatives and the Senate and their staffs.

71.—(1) There shall be a Clerk to the House of Representatives and a Clerk to the Senate.

(2) The offices of the Clerk to the House of Representatives and the Clerk to the Senate and of the members of their staffs shall be public offices.

(3) Nothing in this section shall be construed as preventing the appointment of one person to the offices of Clerk to the House of Representatives and Clerk to the Senate or the appointment of one person to any office on the staff of the Clerk to the House of Representatives and any office on the staff of the Clerk to the Senate.

(4) The Clerk to the House of Representatives or a member of his staff shall not perform the functions of any public office other than an office referred to in subsection (2) of this section without the concurrence of the Speaker; and the Clerk to the Senate or a member of his staff shall not perform the functions of any public office other than an office referred to in that subsection without the concurrence of the President of the Senate.

CHAPTER VI
THE EXECUTIVE

Executive authority of Fiji.

72.—(1) The executive authority of Fiji is vested in Her Majesty.

(2) Save as otherwsie provided in this Constitution, that authority may be exercised on behalf of Her Majesty by the Governor-General either directly or through officers subordinate to him.

(3) Nothing in this section shall preclude persons or authorities other than the Governor-General from exercising such functions as may be conferred upon them by any law.

Ministers.

73.—(1) There shall be a Prime Minister, an Attorney-General and such other offices of Minister of the Government, not exceeding such number, if any, as Parliament may prescribe, as may be established by the Governor-General, acting in accordance with the advice of the Prime Minister.

(2) The Governor-General, acting in his own deliberate judgment, shall appoint as Prime Minister the member of the House of Representatives who appears to him best able to command the support of the majority of the members of that House:

Provided that if occasion arises for making an appointment between a dissolution of Parliament and the next following general election of members of the House of Representatives the persons who were members of that House immediately before the dissolution shall be regarded for the purposes of this subsection as continuing to be members thereof.

(3) The Ministers other than the Prime Minister shall be appointed by the Governor-General acting in accordance with the advice of the Prime Minister:

Provided that—

(*a*) a person shall not be qualified to be appointed as Attorney-General unless he is entitled to practise as a barrister and solicitor in Fiji; and

(*b*) a person who has vacated office as a Minister under subsection (4) or paragraph (*a*) or (*b*) of subsection (5) of the next following section shall not be reappointed as a Minister before the next dissolution of Parliament unless at the time of his appointment he is a member of either House of Parliament.

(4) If the person holding the office of Attorney-General is for any reason unable to perform the functions of his office, those functions may be performed by such other person, being a person entitled to practise as a barrister and solicitor in Fiji (whether or not he is a member of either House of Parliament), as the Governor-General acting in accordance with the advice of the Prime Minister, may direct.

Tenure of office of Ministers.

74.—(1) If a resolution of no confidence in the Government is passed by the House of Representatives and the Prime Minister does not within three days resign from his office the Governor-General shall remove the Prime Minister from office unless, in pursuance of section 70(1) of this Constitution, Parliament has been or is to be dissolved in consequence of such resolution.

(2) If at any time between the holding of a general election and the first sitting of the House of Representatives thereafter the Governor-General, acting in his own deliberate judgment, considers that, in consequence of changes in the membership of the House resulting from that general election, the Prime Minister will not be able to command the support of a majority of the members of the House, the Governor-General may remove the Prime Minister from office.

(3) The office of Prime Minister shall also become vacant—

(*a*) if he ceases to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament;

(*b*) if, at the first sitting of the House of Representatives after any general election of members thereof, he is not a member of the House.

(4) If a Minister (other than the Prime Minister)—

(*a*) was a member of the House of Representatives immediately before a dissolution of Parliament and is not elected as a member of the House at the next following general election of members thereof; or

(*b*) was not a member of either House of Parliament at the date of his appointment as a Minister,

he shall vacate his office as a Minister on the expiration of three months from the date prescribed for polling in that general election or, as the case may be, from the date of his appointment as a Minister unless he is then a member of either House of Parliament.

(5) The office of a Minister (other than the Prime Minister) shall also become vacant—

(*a*) if, in the case of a Minister who is a member of the House of Representatives, he ceases to be such a member otherwise than by reason of a dissolution of Parliament;

(*b*) if, in the case of a Minister who is a member of the Senate, he ceases to be such a member;

(*c*) if the Governor-General, acting in accordance with the advice of the Prime Minister, so directs;

(*d*) if the Prime Minister resigns from office after the passage by the House of a resolution of no confidence in the Government or is removed from office in pursuance of the provisions of subsection (1) or (2) of this section; or

(*e*) upon the appointment of any person to the office of Prime Minister.

The Cabinet.

75.—(1) There shall be a Cabinet for Fiji consisting of the Prime Minister and such of the other Ministers as the Prime Minister may from time to time designate.

(2) The functions of the Cabinet shall be to advise the Governor-General in the government of Fiji and the Cabinet shall be collectively responsible to Parliament for any advice given to the Governor-General by or under the general authority of the Cabinet and for all things done by or under the authority of any Minister in the execution of his office.

(3) The provisions of the preceding subsection shall not apply in relation to—

(*a*) the appointment and removal from office of Ministers and Assistant Ministers, the assigning of responsibility to any Minister under the next following section, or the authorisation of another Minister to perform the functions of the Prime Minister during illness or absence;
(*b*) the dissolution of Parliament; or
(*c*) the matters referred to in section 88 of this Constitution (which relate to the prerogative of mercy).

Assignment of responsibilities to Ministers.

76.—(1) The Governor-General, acting in accordance with the advice of the Prime Minister, may, by directions in writing, assign to the Prime Minister or any other Minister responsibility for the conduct (subject to the provisions of this Constitution and any other law) of any business of the Government, including responsibility for the administration of any department of the Government.

(2) Without prejudice to the assignment of any responsibility to him under the preceding subsection, the Attorney-General shall be the principal legal adviser to the Government.

Performance of Prime Minister's functions during illness or absence.

77.—(1) Whenever the Prime Minister is unable, by reason of illness or absence from Fiji, to perform the functions conferred on him by this Constitution, the Governor-General may, by directions in writing, authorise some other Minister to perform those functions (other than the functions conferred by this section) and that Minister may perform those functions until his authority is revoked by the Governor-General.

(2) The powers of the Governor-General under this section shall be exercised by him in accordance with the advice of the Prime Minister:

Provided that if the Governor-General, acting in his own deliberate judgment, considers that it is impracticable to obtain the advice of the Prime Minister owing to the Prime Minister's illness or absence, the Governor-General may exercise those powers without that advice and in his own deliberate judgment.

Exercise of Governor-General's functions.

78.—(1) In the exercise of his functions under this Constitution or any other law, the Governor-General shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except in cases where he is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority other than the Cabinet or in his own deliberate judgment.

(2) Where the Governor-General is required by this Constitution to exercise any function after consultation with any person or authority other than the Cabinet, he shall not be obliged to exercise that function in accordance with the advice of that person or authority.

(3) Where the Governor-General is required by this Constitution to act in accordance with the advice of, or after consultation with, any person or authority, the question whether he has in any matter so acted shall not be called in question in any court of law.

Governor-General to be kept informed.

79. The Prime Minister shall keep the Governor-General fully informed concerning the general conduct of the government of Fiji and shall furnish the Governor-General with such information as he may request with respect to any particular matter relating to the government of Fiji.

Assistant Ministers.

80.—(1) The Governor-General may appoint Assistant Ministers, not exceeding such number, if any, as Parliament may prescribe, to assist Ministers in the performance of their duties.

(2) The provisions of sections 73(3) and 74(4) and (5) of this Constitution shall apply in relation to Assistant Ministers as they apply in relation to Ministers other than the Prime Minister.

Oaths to be taken by Ministers.

81. A Minister or an Assistant Minister shall not enter upon the duties of his office unless he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as is prescribed by schedule 1 to this Constitution.

Direction, etc. of government departments.

82. Where any Minister has been charged with responsibility for the administration of any department of the Government, he shall exercise general direction and control over that department and, subject to such direction and control, any department in the charge of a Minister (including the office of the Prime Minister or any other Minister) shall be under the supervision of a Permanent Secretary or of some other supervising officer whose office shall be a public office:

Provided that—

(*a*) any such department may be under the joint supervision of two or more supervising officers; and

(*b*) different parts of any such department may respectively be under the supervision of different supervising officers.

Secretary to the Cabinet.

83.—(1) There shall be a Secretary to the Cabinet, whose office shall be a public office.

(2) The Secretary to the Cabinet shall be responsible, in accordance with such instructions as may be given to him by the Prime Minister, for arranging the business for, and keeping the minutes of, the Cabinet or any committee thereof and for conveying the decisions of the Cabinet or any committee thereof to the appropriate person or authority, and shall have such other functions as the Prime Minister may direct.

Commissioner of Police.

84.—(1) There shall be a Commissioner of Police, whose office shall be a public office.

(2) The Police Force shall be under the command of the Commissioner of Police.

(3) The Prime Minister, or such other Minister as may be authorised in that behalf by the Prime Minister, may give to the Commissioner of Police such general directions of policy with respect to the maintenance of public safety and public order as he may consider necessary and the Commissioner shall comply with such directions or cause them to be complied with.

(4) Nothing in this section shall be construed as precluding the assignment to a Minister of responsibility under section 76(1) of this Constitution for the organisation, maintenance and administration of the Police Force, but the Commissioner of Police shall be responsible for determining the use and controlling the operations of the Force and, except as provided in the preceding subsection, the Commissioner shall not, in the exercise of his responsibilities and powers with respect to the use and operational control of the Force, be subject to the direction or control of any person or authority.

Director of Public Prosecutions.

85.—(1) There shall be a Director of Public Prosecutions whose office shall be a public office.

(2) Power to make appointments to the office of Director of Public Prosecutions shall vest in the Judicial and Legal Services Commission:

Provided that the Commission shall not select for appointment to hold that office a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister has agreed that such a person may be so selected.

(3) A person shall not be qualified to hold or act in the office of Director of Public Prosecutions unless he is qualified for appointment as a judge of the Supreme Court.

(4) The Director of Public Prosecutions shall have power in any case in which he considers it desirable so to do—

(*a*) to institute and undertake criminal proceedings before any court of law (not being a court established by a disciplinary law);

(*b*) to take over and continue any such criminal proceedings that may have been instituted by any other person or authority; and

(*c*) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.

(5) The powers of the Director of Public Prosecutions under the preceding subsection may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.

(6) The powers conferred upon the Director of Public Prosecutions by paragraphs (*b*) and (*c*) of subsection (4) of this section shall be vested in him to the exclusion of any other person or authority:

Provided that, where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority at any stage before the person against whom the proceedings have been instituted has been charged before the court.

(7) In the exercise of the powers conferred upon him by this section the Director of Public Prosecutions shall not be subject to the direction or control of any other person or authority.

(8) For the purposes of this section, any appeal from any determination in any criminal proceedings before any court, or any case stated or question of law reserved for the purposes of any such proceedings to any other court, shall be deemed to be part of those proceedings:

Provided that the power conferred on the Director of Public Prosecutions by subsection (4)(*c*) of this section shall not be exercised in relation to any appeal by a person convicted in any criminal proceedings or to any case stated or question of law reserved except at the instance of such a person.

Leader of Opposition.

86.—(1) There shall be a Leader of the Opposition who shall be appointed by the Governor-General.

(2) Whenever the Governor-General has occasion to appoint a Leader of the Opposition he shall appoint—

(*a*) if there is one opposition party whose numerical strength in the House of Representatives is greater than the strength of any other opposition party, the member of the House of Representatives who is the leader in the House of that party; or

(*b*) if there is no such party, the member of the House whose appointment would, in the judgment of the Governor-General, be most acceptable to the leaders in the House of the oppostion parties:

Provided that, if occasion arises for making an appointment between a dissolution of Parliament and the next following general election of members of the House of Representatives, the persons who were members of that House immediately bfore the dissolution shall be regarded for the purposes of this subsection as continuing to be members thereof.

(3) If the Governor-General considers that the Leader of the Opposition is no longer the person who, if the office of Leader of the Opposition were vacant, should be appointed thereto under the preceding subsection, the Governor-General may remove the Leader of the Opposition from office.

(4) The office of Leader of the Opposition shall also become vacant—

(*a*) if he ceases to be a member of the House of Representatives otherwise than by reason of a dissolution of Parliament;

(*b*) if, at the first sitting of the House of Representatives after any general election, he is not a member of the House.

(5) During any period in which the office of Leader of the Opposition is vacant by reason that there is no such opposition party as is referred to in subsection (2)(*a*) of this section and the Governor-General is of the opinion that no member of the House would be acceptable to the leaders of the opposition parties for the purposes of subsection (2)(*b*) of this section or by reason that there are no opposition parties for the purposes of this section, the operation of any provision of this Constitution shall—

(*a*) to the extent that it requires the Governor-General to act in accordance with the advice of the Leader of the Opposition have effect as if it required the Governor-General to act in his own deliberate judgment; or

(*b*) to the extent that it requires the Governor-General, the Prime Minister or any Commission to consult the Leader of the Opposition, be suspended.

(6) For the purposes of this section " oppostion party " means a group of members of the House of Representatives in opposition to the Government, whose number includes a leader who commands their support.

(7) In the exercise of his functions under this section the Governor-General shall act in his own deliberate judgment.

Constitution of offices.

87. Subject to the provisions of this Constitution and of any other law, the Governor-General may constitute offices for Fiji, make appointments to any such office and terminate any such appointment.

Prerogative of Mercy.

88.—(1) The Governor-General may, in Her Majesty's name and on Her Majesty's behalf—

(*a*) grant to any person convicted of any offence under the law of Fiji a pardon, either free or subject to lawful conditions;

(*b*) grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;

(*c*) substitute a less severe form of punishment for any punishment imposed on any person for such an offence; or

(*d*) remit the whole or part of any punishment imposed on any person for such an offence or of any penalty or forfeiture otherwise due to the Crown on account of such an offence.

(2) There shall be a Commission on the Prerogative of Mercy (hereinafter in this section referred to as "the Commission") consisting of a chairman and not less than two other members appointed by the Governor-General, acting in his own deliberate judgment.

(3) A member of the Commission shall vacate his seat on the Commission—

(*a*) at the expiration of the term of his appointment (if any) specified in the instrument of his appointment; or

(*b*) if his appointment is revoked by the Governor-General, acting in his own deliberate judgment.

(4) In the exercise of the powers conferred upon him by subsection (1) of this section, the Governor-General shall act in accordance with the advice of the Commission.

(5) The validity of the transaction of business by the Commission shall not be affected by the fact that some person who was not entitled to do so took part in the proceedings.

(6) Whenever any person has been sentenced to death (otherwise than by a court martial) for an offence, a report on the case by the judge who presided at the trial (or, if a report cannot be obtained from that judge, a report on the case by the Chief Justice), together with such other information derived from the record of the case or elsewhere as may be required by or furnished to the Commission shall be taken into consideration at a meeting of the Commission, which shall then advise the Governor-General whether or not to exercise his powers under subsection (1) of this section in that case.

(7) A Minister having responsibility for any matters relating to the treatment of offenders may consult the Commission with respect to such matters.

CHAPTER VII

THE JUDICATURE

PART 1

The Supreme Court

Establishment of Supreme Court.

89.—(1) There shall be a Supreme Court for Fiji which shall have unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law.

(2) Subject to the provisions of the next following section, the judges of the Supreme Court shall be the Chief Justice and such number of puisne judges as may be prescribed by Parliament:

Provided that the office of a judge shall not be abolished while any person is holding that office unless he consents to its abolition.

Appointment of judges of Supreme Court.

90.—(1) The Chief Justice shall be appointed by the Governor-General acting after consultation with the Prime Minister and the Leader of the Opposition.

(2) The puisne judges shall be appointed by the Governor-General acting after consultation with the Judicial and Legal Services Commission.

(3) A person shall not be qualified to be appointed as a judge of the Supreme Court unless—

(*a*) he holds, or has held, high judicial office in some part of the Commonwealth or in any country outside the Commonwealth that may be prescribed by Parliament; or

(*b*) he is qualified to practise as an advocate in such a court and has been qualified for not less than five years to practise as an advocate or solicitor in such a court.

(4) In computing, for the purposes of the preceding subsection, the period during which any person has been qualified to practise as an advocate or solicitor, any period during which he has held judicial office after becoming so qualified shall be included.

(5) Whenever the office of Chief Justice is vacant or the person holding that office is for any reason unable to perform the functions of his office, then until a person has been appointed to and has assumed the functions of that office or until the holder thereof has resumed those functi ·ns, as the case may be, those functions shall be performed by such one of the puisne judges or (subject to the provisions of the next following section) by such other person qualified for appointment as a judge of the Supreme Court as the Governor-General, acting after consultation with the Prime Minister and the Leader of the Opposition, may appoint for that purpose:

Provided that a person appointed under this subsection who is not a puisne judge may, notwithstanding the assumption or resumption of the functions of the office of Chief Justice by the holder of that office, continue to act as a judge of the Supreme Court for so long thereafter as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto.

(6) If the office of any puisne judge is vacant or if a person holding the office of puisne judge is acting as Chief Justice or is for any reason unable to perform the functions of his office or if the Chief Justice advises the Governor-General that the state of business in the Supreme Court requires that the number of judges should be temporarily increased, the Governor-General, acting after consultation with the Judicial and Legal Services Commission, may appoint a person qualified for appointment as a judge of the Supreme Court to act as a puisne judge.

(7) Any person appointed under the preceding subsection to act as a puisne judge shall, subject to the provisions of subsection (1) of the next following section and unless he is removed from office under that section, continue to act for the period of his appointment or, if no such period is specified, until his appointment is revoked by the Governor-General acting in accordance with the advice of the Chief Justice:

Provided that a person whose period of appointment has expired or whose appointment has been revoked may continue to act as such for so long thereafter as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto.

Tenure of office of judges of Supreme Court.

91.—(1) Subject to the provisions of this section, a judge of the Supreme Court shall vacate his office on attaining the retiring age:

Provided that a person who has attained the retiring age may continue in office for so long thereafter as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age.

(2) A judge of the Supreme Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(3) A judge of the Supreme Court shall be removed from office by the Governor-General if the question of his removal has, at the request of the Governor-General made in pursuance of the next following subsection, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act 1833(**a**) or under any other enactment enabling Her Majesty in that behalf and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or for misbehaviour.

(4) If the Chief Justice or, in relation to the removal of the Chief Justice, the Governor-General, considers that the question of removing a judge of the Supreme Court from office for inability as aforesaid or misbehaviour ought to be investigated, then—

(*a*) the Governor-General shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Governor-General from among persons who hold or have held high judicial office in some part of the Commonwealth or in any country outside the Commonwealth that may be prescribed by Parliament;

(a) 1883 c. 41.

(*b*) the tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether he should request that the question of the removal of that judge from office should be referred by Her Majesty to the Judicial Committee; and

(*c*) if the tribunal so advises, the Governor-General shall request that the question should be referred accordingly.

(5) If the question of removing a judge of the Supreme Court from office has been referred to a tribunal under the preceding subsection, the Governor-General may suspend the judge from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General and shall in any case cease to have effect—

(*a*) if the tribunal advises the Governor-General that he should not request that the question of the removal of the judge from office should be referred by Her Majesty to the Judicial Committee; or

(*b*) if the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.

(6) Except where the context otherwise requires, the functions of the Governor-General under this section shall be exercised by him in his own deliberate judgment.

(7) The retiring age for the purposes of subsection (1) of this section shall be the age of sixty-two years or such higher age as may be prescribed by Parliament:

Provided that a provision of any Act of Parliament, to the extent that it alters the age at which judges of the Supreme Court shall vacate their offices, shall not have effect in relation to a judge after his appointment unless he consents to its having effect.

Oaths to be taken by judges of Supreme Court.

92. A judge of the Supreme Court shall not enter upon the duties of his office until he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as is prescribed by schedule 1 to this Constitution:

Provided that no person shall be required to take either such oath if he shall have taken such oath within Fiji on any previous occasion.

PART 2

The Court of Appeal

Establishment of Court of Appeal.

93. There shall be a Court of Appeal for Fiji having such jurisdiction and powers as may be conferred on it by this Constitution or any other law.

Composition of Court of Appeal.

94.—(1) The judges of the Court of Appeal shall be—

(*a*) the Chief Justice, who shall be the President of the Court of Appeal;

(*b*) such Justices of Appeal as may be appointed under the next following subsection; and

(*c*) the puisne judges of the Supreme Court.

(2) The Justices of Appeal shall be appointed by the Governor-General acting after consultation with the Judicial and Legal Services Commission.

(3) A person shall not be qualified to be appointed under the preceding subsection unless he is qualified for appointment as a judge of the Supreme Court.

(4) A judge of the Court of Appeal shall not sit as a judge of the Court on the hearing of an appeal—

(*a*) from any decision given by himself or any decision given by any court of which he was sitting as a member; or

(*b*) against a conviction or sentence if he was the judge by or before whom the appellant was convicted.

(5) If each House of Parliament resolves that the provisions of schedule 2 to this Constitution (which contain alterations to subsection (1) of this section and to certain other provisions of this Constitution relating to the judges of the Court of Appeal) shall have effect, those provisions shall have effect accordingly as from such date as may be specified in the resolutions passed by the two Houses for the purposes of this subsection or, if no date is so specified, as from such date, not being later than three months after the date on which the second of those resolutions is passed, as may be appointed by the Governor-General by proclamation:

Provided that the two Houses may resolve that only the provisions of part 1 of the said schedule shall have effect, and where they do so they may subsequently resolve that the provisions of part 2 of that schedule shall also have effect, and in any such case the foregoing provisions of this subsection shall apply in relation to part 1 or, as the case may be, part 2 of that schedule accordingly.

Tenure of office of judges of Court of Appeal.

95.—(1) Subject to the provisions of this section, a Justice of Appeal shall vacate his office upon the expiration of the period of his appointment to that office:

Provided that a person whose period of appointment has expired may continue in office for so long thereafter as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before the expiration of that period.

(2) Except in the case of a Justice of Appeal who, at the time of his appointment also holds office as a judge of a court in some other part of the Commonwealth or in any country outside the Commonwealth, the period for which a Justice of Appeal is appointed shall be not less than three years.

(3) A Justice of Appeal may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour, and shall not be so removed except in accordance with the provisions of this section.

(4) A Justice of Appeal shall be removed from office by the Governor-General if the question of his removal has, at the request of the Governor-General made in pursuance of the next following subsection, been referred by Her Majesty to the Judicial Committee of Her Majesty's Privy Council under section 4 of the Judicial Committee Act 1833(a) or under any other enactment enabling Her

(a) 1833 c. 41.

Majesty in that behalf and the Judicial Committee has advised Her Majesty that the judge ought to be removed from office for inability as aforesaid or for misbehaviour.

(5) If the President of the Court of Appeal considers that the question of removing a Justice of Appeal from office for inability as aforesaid or misbehaviour ought to be investigated, then—

(*a*) the Governor-General shall appoint a tribunal which shall consist of a chairman and not less than two other members, selected by the Governor-General from among persons who hold or have held high judicial office in some part of the Commonwealth or in any country outside the Commonwealth that may be prescribed by Parliament;

(*b*) the tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether he should request that the question of the removal of that judge from office should be referred by Her Majesty to the Judicial Committee; and

(*c*) if the tribunal so advises, the Governor-General shall request that the question should be referred accordingly.

(6) If the question of removing a Justice of Appeal from office has been referred to a tribunal under the preceding subsection, the Governor-General may suspend him from performing the functions of his office, and any suspension may at any time be revoked by the Governor-General and shall in any case cease to have effect—

(*a*) if the tribunal advises the Governor-General that he should not request that the question of the removal of the judge from office should be referred by Her Majesty to the Judicial Committee; or

(*b*) if the Judicial Committee advises Her Majesty that the judge ought not to be removed from office.

(7) Expect where the context otherwise requires, the functions of the Governor-General under this section shall be exercised by him in accordance with the advice of the President of the Court of Appeal.

Oaths to be taken by judges of Court of Appeal.

96. A Justice of Appeal shall not enter upon the duties of his office until he has taken and subscribed the oath of allegiance and such oath for the due execution of his office as is prescribed by schedule 1 to this Constitution:

Provided that no person shall be required to take either such oath if he shall have taken such oath within Fiji on any previous occasion.

PART 3

Jurisdiction of the Supreme Court and appeals

Original jurisdiction of Supreme Court in constitutional questions.

97.—(1) Subject to the provisions of sections 44(2), 78(3) and 117(1) of this Constitution, if any person alleges that any provision of this Constitution (other than Chapter II) has been contravened and that his interests are being or are likely to be affected by such contravention, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for a declaration and for relief under this section.

(2) The Supreme Court shall have jurisdiction, in any application made by any person in pursuance of the preceding subsection or in any other proceedings lawfully brought before the Court, to determine whether any provision of this Constitution (other than Chapter II) has been contravened and to make a declaration accordingly:

Provided that the Supreme Court shall not make a declaration in pursuance of the jurisdiction conferred by this subsection unless it is satisfied that the interests of the person by whom the application under the preceding subsection is made or, in the case of other proceedings before the Court, a party to those proceedings, are being or are likely to be affected.

(3) Where the Supreme Court makes a declaration in pursuance of the preceding subsection that any provision of the Constitution has been contravened and the person by whom the application under subsection (1) of this section was made or, in the case of other proceedings before the Court, the party in those proceedings in respect of whom the declaration is made, seeks relief, the Supreme Court may grant to that person such remedy, being a remedy available against any person in any proceedings in the Supreme Court under any law for the time being in force in Fiji, as the Court considers appropriate.

(4) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred on it by this section (including rules with respect to the time within which applications shall be made under subsection (1) of this section).

(5) Nothing in this section shall confer jurisdiction on the Supreme Court to hear or determine any such question as is referred to in section 37 or 51 of this Constitution.

Supreme Court and subordinate courts.

98.—(1) The Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.

(2) Where any question as to the interpretation of any provision of this Constitution other than Chapter II arises in any subordinate court and the court is of opinion that the question involves a substantial question of law, the court shall refer the question to the Supreme Court.

(3) Where any question is referred to the Supreme Court in pursuance of the preceding subsection, the Supreme Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if the decision is the subject of an appeal to the Court of Appeal or Her Majesty in Council, in accordance with the decision of the Court of Appeal or, as the case may be, of Her Majesty in Council.

Appeals to Court of Appeal.

99.—(1) An appeal to the Court of Appeal shall lie from decisions of the Supreme Court in the following cases, that is to say—

(*a*) as of right from final decisions in any civil or criminal proceedings on questions as to the interpretation of this Constitution;

(*b*) as of right from final decisions given in exercise of the jurisdiction conferred on the Supreme Court by section 17 or 97 of this Constitution;

(*c*) as of right from final decisions given in exercise of jurisdiction conferred on the Supreme Court in pursuance of section 8(1) of this Constitution; and

(*d*) in such other cases as may be prescribed.

(2) The foregoing provisions of this section shall be subject to the provisions of sections 37(3) and 51(3) of this Constitution.

(3) In this section the references to final decisions of the Supreme Court do not include any determination thereof that any application made thereto is merely frivolous or vexatious.

Appeals to Her Majesty in Council.

100.—(1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases, that is to say—

(*a*) from final decisions in any appeal to the Court of Appeal by virtue of paragraph (*a*) or (*b*) of section 99(1) of this Constitution;

(*b*) from final decisions in any civil proceedings where the matter in dispute on the appeal to Her Majesty in Council is of the value of 1,000 dollars or upwards or where the appeal involves, directly or indirectly, a claim to or a question respecting property or a right of the value of 1,000 dollars or upwards; and

(*c*) in such other cases as may be prescribed.

(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of that court in the following cases, that is to say—

(*a*) from decisions in any civil proceedings where in the opinion of the court the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council; and

(*b*) in such other cases as may be prescribed.

(3) Nothing in this or the preceding section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter.

CHAPTER VIII

SERVICE COMMISSIONS AND THE PUBLIC SERVICE

Judicial and Legal Services Commission.

101.—(1) There shall be a Judicial and Legal Services Commission which shall consist of—

(*a*) the Chief Justice, who shall be chairman;

(*b*) the chairman of the Public Service Commission; and

(*c*) one other member (in this section referred to as "the appointed member") appointed by the Governor-General acting in accordance with the advice of the Chief Justice.

(2) A person shall not be qualified to be appointed as the appointed member unless he is qualified to be appointed as a judge of the Supreme Court:

Provided that a person who is in active practice as a barrister and solicitor in Fiji shall be disqualified for appointment.

(3) A person shall not be qualified to be appointed as the appointed member if he is, or has at any time during the three years immediately preceding his appointment been—

(*a*) a member of the House of Representatives or the Senate or an elected member of any local authority;

(*b*) nominated with his consent as a candidate for election as a member of the House of Representatives or of any local authority or as a candidate for selection by the Great Council of Chiefs or the Council of Rotuma for appointment by the Governor-General as a member of the Senate;

(*c*) a public officer other than a Justice of Appeal or a local government officer; or

(*d*) the holder of an office (not being an office the functions of which relate only to a part of Fiji) in any political organisation that sponsors or otherwise supports or has during the said period of three years sponsored or otherwise supported a candidate for election as a member of the House of Representatives.

(4) The appointed member shall not, within the period of three years commencing with the day on which he last held or acted in the office of appointed member be eligible for appointment to or to act in any public office.

(5) Subject to the provisions of section 108 of this Constitution, the appointed member shall vacate his office—

(*a*) at the expiration of three years from the date of his appointment; or

(*b*) if any circumstances arise that, if he were not the appointed member, would cause him to be disqualified for appointment as such.

(6) If the office of the appointed member is vacant or the appointed member is for any reason unable to perform the functions of his office, the Governor-General, acting in accordance with the advice of the Chief Justice, may appoint a person qualified for appointment as such to act as the appointed member, and any person so appointed shall, subject to subsection (5)(*b*) of this section, continue to act until his appointment is revoked by the Governor-General, acting in accordance with the advice of the Chief Justice.

Appointment, etc., of judicial and legal officers.

102.—(1) Power to make appointments to the offices to which this section applies (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Judicial and Legal Services Commission:

Provided that:—

(*a*) before making any appointment to hold or act in the office of a central agricultural tribunal the Commission shall consult the Prime Minister and the Leader of the Opposition; and

(*b*) the Commission shall not select for appointment to hold an office to which this section applies a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister has agreed that such a person may be so selected.

(2) The offices to which this section applies are the offices specified in schedule 3 to this Constitution and such other offices as may be prescribed by Parliament:

Provided that—

(*a*) if the name of any such office is changed, or any such office is abolished, the provisions of this section and that schedule shall have effect accordingly;

(*b*) this section shall also apply to such other offices, being offices that in the opinion of the Judicial and Legal Services Commission are offices similar to those specified in schedule 3 to this Constitution, as may be prescribed by the Commission, acting with the concurrence of the Prime Minister.

Appointments, etc. of principal representatives of Fiji abroad and appointment on transfer of certain other officers.

103.—(1) Power to make appointments to the offices of Ambassador, High Commissioner or other principal representative of Fiji in any other country or accredited to any international organisation and to remove persons holding or acting in such offices shall vest in the Governor-General, acting in accordance with the advice of the Prime Minister:

Provided that before advising the Governor-General to appoint to or to act in any such office a person who holds or is acting in some other public office the Prime Minister shall consult the Public Service Commission.

(2) The powers conferred by the preceding subsection shall not be construed as including any power to remove from the public service or any power conferred by any law to require or permit the retirement from the public service of a person who is the holder of an office referred to in that subsection and whose service therein may be taken into account for the purpose of computing his pension under any law relating to the grant of pensions in respect of his service in the public service; and any such power in relation to such a person or to a person who has ceased to be such a person by reason of his removal from office and who has not been appointed to some other public office shall, subject to the provisions of the next following subsection, vest in the Public Service Commission.

(3) Where a person—

(*a*) has been removed from his office under subsection (1) of this section but has not been removed from the public service and his service in that office may be taken into account for the purpose mentioned in the preceding subsection; and

(*b*) he is not appointed, within such time as the Public Service Commission considers to be reasonable, to some other public office—

(i) that, in the opinion of the Commission is a comparable office, and

(ii) that is an office service in which, in the circumstances of his appointment thereto may be taken into account as aforesaid,

that person shall be deemed to have retired from the public service on such date as the Public Service Commission may specify for the purposes of any law relating to the grant of pensions in respect of his service in the public service, and he shall be eligible for the grant of a pension thereunder notwithstanding that he may not have attained any qualifying age specified therein or that he may not have completed any qualifying period of service specified therein:

Provided that where a person such as is mentioned in paragraph (*a*) of this subsection accepts, within such time as the Public Service Commission considers to be reasonable, appointment to some other public office that is not such an office as is mentioned in paragraph (*b*)(i) of this subsection, he may elect that the provisions of this subsection shall not apply to him.

(4) The power to make appointments to any office to which this subsection applies on transfer from another such office carrying the same salary shall vest in the Prime Minister or such other Minister as the Prime Minister may designate by directions in writing.

(5) The Minister in whom the power referred to in the preceding subsection is for the time being vested may, subject to such conditions and in respect of such offices as he thinks fit, delegate that power by directions in writing to any public officer.

(6) The offices to which subsection (4) of this section applies are—

(*a*) such public offices (other than those referred to in subsection (1) of this section) the holders of which are required to reside outside Fiji for the proper discharge of their functions; and

(*b*) such public offices in the department responsible for the foreign affairs of Fiji,

as may be prescribed by the Prime Minister.

Public Service Commission.

104.—(1) There shall be a Public Service Commission which shall consist of a chairman and not less than three nor more than five other members appointed by the Governor-General.

(2) A person shall not be qualified to be appointed as a member of the Public Service Commission if he is, or has at any time during the three years immediately preceding his appointment been—

(*a*) a member of the House of Representatives or the Senate or an elected member of any local authority;

(*b*) nominated with his consent as a candidate for election as a member of the House of Representatives or of any local authority or as a candidate for selection by the Great Council of Chiefs or the Council of Rotuma for appointment by the Governor-General as a member of the Senate;

(*c*) a public officer or a local government officer; or

(*d*) the holder of an office (not being an office the functions of which relate only to a part of Fiji) in any political organisation that sponsors or otherwise supports or has during the said period of three years sponsored or otherwise supported a candidate for election to the House of Representatives.

(3) A person shall not be qualified to be appointed as a member of the Public Service Commission if he is a member of the Police Service Commission:

Provided that a person shall not be disqualified for appointment as the chairman of the Public Service Commission if he is the chairman of the Police Service Commission.

(4) A member of the Public Service Commission shall not, within the period of three years commencing with the day on which he last held or acted in the office of member of the Commission, be eligible for appointment to or to act in any public office.

(5) Subject to the provisions of section 108 of this Constitution, a member of the Public Service Commission shall vacate his office—

(*a*) at the expiration of three years from the date of his appointment; or

(*b*) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment as such.

(6) Whenever the office of chairman of the Public Service Commission is vacant or the chairman is for any reason unable to perform the functions of his office, those functions shall be performed by such one of the other members of the Commission as the Governor-General may appoint.

(7) If at any time there are less than three members of the Public Service Commission besides the chairman or if any such member is acting as chairman or is for any reason unable to perform the functions of his office, the Governor-General may appoint a person qualified for appointment as a member of the Commission to act as a member, and any person so appointed shall, subject to subsection (5)(*b*) of this section, continue to act until his appointment is revoked by the Governor-General.

(8) The functions of the Governor-General under this section shall be exercised by him in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.

Appointment, etc., of public officers.

105.—(1) Subject to the provisions of this Constitution, power to make appointments to public offices (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Public Service Commission.

(2) Except in relation to any office referred to in subsection (4) or (5) of this section, the Public Service Commission may, subject to such conditions as it thinks fit, delegate any of its powers under this section by directions in writing to any member of the Commission or, subject to any limitations that Parliament may prescribe, to any public officer or class of public officer.

(3) The provisions of this section shall not apply in relation to—

(*a*) the office of any judge of the Supreme Court or the Court of Appeal;

(*b*) except for the purpose of making appointments thereto or to act therein, the office of Auditor-General;

(*c*) the office of Ombudsman;

(*d*) any office appointments to which are within the functions of the Judicial and Legal Services Commission;

(*e*) any office referred to in section 103(1) of this Constitution;

(*f*) the office of any member of the Police Force or of any naval, military or air force; or

(*g*) a teacher employed in pursuance of a scheme of co-operation with the Government of New Zealand;

(*h*) any office or class of office in the public service prescribed by regulations made by the Public Service Commission with the concurrence of the Prime Minister as being an office or class of office to which this section does not apply.

(4) Before making any appointment to hold or act in the office of Auditor-General or to an agricultural tribunal, the Public Service Commission shall consult the Prime Minister and the Leader of the Opposition.

(5) The Public Service Commission shall not make any appointment to hold or act in the office of Secretary to the Cabinet or of a Permanent Secretary or of any other supervising officer within the meaning of section 82 of this Constitution unless the Prime Minister concurs in the appointment.

(6) Before making any appointment to hold or act in any office on the staff of the Ombudsman, the Public Service Commission shall consult the Ombudsman.

(7) The Public Service Commission shall not exercise any of its powers in relation to any office on the personal staff of the Governor-General or in relation to any person holding or acting in any such office without the concurrence of the Governor-General, acting in his own deliberate judgment.

(8) Before exercising any of its powers in relation to the offices of the Clerk to the House of Representatives or of any member of his staff or in relation to any person holding or acting in any such office, the Public Service Commission shall consult the Speaker; and before exercising any of its powers in relation to the office of the Clerk to the Senate or of any member of his staff or in relation to any person holding or acting in any such office, the Public Service Commission shall consult the President of the Senate.

(9) In selecting candidates for entry into the public service the Public Service Commission shall—

(*a*) give preference, other things being equal, to local candidates who, in its opinion, are suitably qualified and shall not select persons who are not citizens of Fiji except to the extent that the Prime Minister has agreed that such persons may be selected; and

(*b*) ensure that, so far as possible, each community in Fiji receives fair treatment in the number and distribution of offices to which candidates of that community are appointed on entry.

(10) Parliament may provide for appeals to lie from such decisions of the Public Service Commission to such person or authority as Parliament may prescribe.

olice Service ommission.

106.—(1) There shall be a Police Service Commission which shall consist of a chairman and two other members appointed by the Governor-General.

(2) A person shall not be qualified to be appointed as a member the the Police Service Commission if he is, or has at any time during the three years immediately preceding his appointment been—

(*a*) a member of the House of Representatives or the Senate or an elected member of any local authority;

(*b*) nominated with his consent as a candidate for election as a member of the House of Representatives or of any local authority or as a candidate for selection by the Great Council of Chiefs or the Council of Rotuma for appointment by the Governor-General as a member of the Senate;

(*c*) a public officer or a local government officer; or

(*d*) the holder of an office (not being an office the functions of which relate only to a part of Fiji) in any political organisation that sponsors or otherwise supports or has during the said period of three years sponsored or otherwise supported a candidate for election to the House of Representatives.

(3) A person shall not be qualified to be appointed as a member of the Police Service Commission if he is a member of the Public Service Commission:

Provided that a person shall not be disqualified for appointment as the chairman of the Police Service Commission if he is the chairman of the Public Service Commission.

(4) A member of the Police Service Commission shall not, within the period of three years commencing with the day on which he last held or acted in the office of member of the Commission, be eligible for appointment to or to act in any public office.

(5) Subject to the provisions of section 108 of this Constitution, a member of the Police Service Commission shall vacate his office—

(*a*) at the expiration of three years from the date of his appointment; or

(*b*) if any circumstances arise that, if he were not a member of the Commission, would cause him to be disqualified for appointment as such.

(6) Whenever the office of chairman of the Police Service Commission is vacant or the chairman is for any reason unable to perform the functions of his office, those functions shall be performed by such one of the other members of the Commission as the Governor-General may appoint.

(7) If the office of a member of the Police Service Commission other than the chairman is vacant or if any such member is acting as chairman or is for any reason unable to perform the functions of

his office, the Governor-General may appoint a person qualified for appointment as a member of the Commission to act as a member, and any person so appointed shall, subject to subsection (5)(*b*) of this section, continue to act until his appointment is revoked by the Governor-General.

(8) The functions of the Governor-General under this section shall be exercised by him in accordance with the advice of the Prime Minister tendered after the Prime Minister has consulted the Leader of the Opposition.

Appointment, etc. of members of the Police Force.

107.—(1) Power to make appointments to offices in the Police Force above the rank of Senior Inspector (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Police Service Commission:

Provided that before making any appointment to hold or act in the office of Commissioner of Police or Deputy Commissioner of Police the Police Service Commission shall consult the Prime Minister.

(2) Power to make appointments to offices in the Police Force of or below the rank of Senior Inspector (including power to confirm appointments) and to remove and to exercise disciplinary control over persons holding or acting in such offices shall vest in the Commissioner of Police:

Provided that the Commissioner of Police shall not remove such a person from office or reduce him in rank unless the Police Service Commission concurs in the removal or reduction.

(3) The Police Service Commission may, subject to such conditions as it thinks fit, delegate by directions in writing—

(*a*) any of its powers under this section to any member of the Commission; or

(*b*) to such extent as the Prime Minister may prescribe by directions in writing, any of its powers under subsection (1) of this section to the Commissioner of Police.

(4) The Police Service Commission or the Commissioner of Police shall not select for appointment to hold any office in the Police Force a person who is not a citizen of Fiji and is not a public officer unless the Prime Minister has agreed that such a person may be so selected.

(5) If provision is made by or under any law altering the ranks into which the Police Force is divided, the Police Service Commission may by order specify some other rank in the Police Force as being equivalent to the rank of Senior Inspector as it existed before such alteration, and the references in subsections (1) and (2) of this section to the rank of Senior Inspector shall then be construed as if they were references to the rank for the time being so specified.

Removal from office of members of Commissions.

108.—(1) A person holding an office to which this section applies (in this section referred to as " a Commissioner ") may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(2) A Commissioner shall be removed from office by the Governor-General if the question of his removal from that office has been referred to a tribunal appointed under the next following subsection and the tribunal has advised the Governor-General that he ought to be removed from office for inability as aforesaid or for misbehaviour.

(3) If the Governor-General considers that the question of removing a Commissioner ought to be investigated, the —

(*a*) the Governor-General shall appoint a tribunal in accordance with the provisions of subsection (6) of this section; and

(*b*) that tribunal shall enquire into the matter and report on the facts thereof to the Governor-General and advise the Governor-General whether the Commissioner ought to be removed under this section.

(4) If the question of removing a Commissioner has been referred to a tribunal under this section, the Governor-General may suspend the Commissioner from performing the functions of his office, and any such suspension may at any time be revoked by the Governor-General, and shall in any case cease to have effect if the tribunal advises the Governor-General that the Commissioner should not be removed.

(5) The offices to which this section applies are those of appointed member of the Judicial and Legal Services Commission, member of the Public Service Commission and member of the Police Service Commission.

(6) A tribunal appointed under this section shall consist of a chairman and two other members, and—

(*a*) in the case of a tribunal to investigate the removal of the appointed member of the Judicial and Legal Services Commission, all members of the tribunal shall be persons who hold or have held high judicial office in some part of the Commonwealth; and

(*b*) in any other case, the chairman and one other member shall be persons who hold or have held such office.

(7) Except as provided in subsection (2) of this section, the functions of Governor-General under this section shall be exercised by him—

(*a*) in relation to the appointed member of the Judicial and Legal Services Commission, in accordance with the advice of the Chief Justice; and

(*b*) in relation to a member of the Public Service Commission or the Police Service Commission, in accordance with the advice of the Prime Minister.

Tenure of office of Supervisor of Elections, Director of Public Prosecutions and Auditor-General.

109.—(1) Subject to the provisions of this section, a person holding or acting in an office to which this section applies shall vacate that office on attaining the age of sixty years:

Provided that the Governor-General, acting after consultation with the Prime Minister and the Public Service Commission may permit an Auditor-General to continue in office for a period not exceeding six months after he has attained that age.

(2) Any person holding an office to which this section applies may be removed from office only for inability to discharge the functions of his office (whether arising from infirmity of body or mind or any other cause) or for misbehaviour and shall not be so removed except in accordance with the provisions of this section.

(3) Any such person shall be removed from office by the appropriate Commission if the question of his removal from that office has been referred to a tribunal appointed under the next following subsection and the tribunal has advised the Commission that he ought to be removed from office for inability as aforesaid or for misbehaviour.

(4) If the appropriate Commission considers that the question of removing any such person ought to be investigated then—

(*a*) the Commission shall appoint a tribunal which shall consist of a chairman and not less than two other members, being persons who hold or have held high judicial office in some part of the Commonwealth; and

(*b*) that tribunal shall enquire into the matter and report on the facts thereof to the Commission and advise the Commission whether he ought to be removed under this section.

(5) If the question of removing any such person has been referred to a tribunal under this section, the appropriate Commission may suspend him from performing the functions of his office, and any such suspension may at any time be revoked by the Commission and shall in any case cease to have effect if the tribunal advises the Commission that he should not be removed.

(6) Any person appointed to act in an office to which this section applies shall, subject to the provisions of subsection (1) of this section, continue to act until his appointment is revoked by the appropriate Commission.

(7) The offices to which this section applies are those of Supervisor of Elections, Director of Public Prosecutions and Auditor-General.

(8) In this section "the appropriate Commission" means—

(*a*) in relation to the office of Supervisor of Elections or Director of Public Prosecutions, the Judical and Legal Services Commission; and

(*b*) in relation to the office of Auditor-General, the Public Service Commission.

(9) Except as provided in subsection (3) of this section, the functions of any Commission under this section shall be exercised by it after consultation with the Prime Minister and the Leader of the Opposition.

Pensions laws and protection of pension rights.

110.—(1) The law to be applied with respect to any pensions benefits that were granted to any person before 10th October 1970 shall be the law that was in force at the date on which those benefits were granted or any law in force at a later date that is not less favourable to that person.

(2) The law to be applied with respect to any pensions benefits (not being benefits to which the preceding subsection applies) shall—

(*a*) in so far as those benefits are wholly in respect of a period of service as a public officer that commenced before 10th October 1970, be the law that was in force immediately before that date; and

(*b*) in so far as those benefits are wholly or partly in respect of a period of service as a public officer that commenced after 9th October 1970, be the law in force on the date on which that period of service commenced,

or any law in force at a later date that is not less favourable to that person.

(3) Where a person is entitled to exercise an option as to which of two or more laws shall apply in his case, the law for which he opts shall, for the purposes of this section, be deemed to be more favourable to him than the other law or laws.

(4) All pensions benefits (except so far as they are a charge on some other fund and have been duly paid out of that fund to the person or authority to whom payment is due) shall be a charge on the Consolidated Fund.

(5) In this section "persons benefits" means any pensions, compensation, gratuities or other like allowances for persons in respect of their service as public officers or for the widows, children, dependents or personal representatives of such persons in respect of such service, and references to service as a public officer do not include references to service in any naval, military or air force.

(6) References in this section to the law with respect to pensions benefits include (without prejudice to their generality) references to the law regulating the circumstances in which such benefits may be granted or in which the grant of such benefits may be refused, the law regulating the circumstances in which any such benefits that have been granted may be withheld, reduced in amount or suspended and the law regulating the amount of any such benefits.

Power of Commissions in relation to pensions, etc.

111.—(1) Where under any law any person or authority has a discretion—

(*a*) to decide whether or not any pensions benefits shall be granted; or

(*b*) to withhold, reduce in amount or suspend any such benefits that have been granted,

those benefits shall be granted and may not be withheld, reduced in amount or suspended unless the appropriate Commission concurs in the refusal to grant the benefits or, as the case may be, in the decision to withhold them, reduce them in amount or suspend them.

(2) Where the amount of any pensions benefits that may be granted to any person is not fixed by law, the amount of the benefits to be granted to him shall be the greatest amount for which he is eligible unless the appropriate Commission concurs in his being granted benefits of a smaller amount.

(3) The appropriate Commission shall not concur under subsection (1) or subsection (2) of this section in action taken on the ground that any person who holds or has held the office of any judge of the Supreme Court or the Court of Appeal, Supervisor of Elections, Director of Public Prosecutions, Ombudsman or Auditor-General has been guilty of misbehaviour unless he has been removed from office by reason of such misbehaviour.

(4) In this section " the appropriate Commission " means—

(*a*) in the case of benefits for which any person may be eligible in respect of the service in the public service of a person who, immediately before he ceased to be a public officer, was subject to the disciplinary control of the Judicial and Legal Services Commission, that Commission;

(*b*) in the case of benefits for which any person may be eligible in respect of the service in the public service of a person who, immediately before he ceased to be a public officer, was a member of the Police Force, the Police Service Commission; and

(*c*) in any other case, the Public Service Commission.

(5) Any person who is entitled to the payment of any pensions benefits and who is ordinarily resident outside Fiji may, within a reasonable time after he has received that payment, remit the whole of it (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Fiji:

Provided that nothing in this subsection shall be construed as preventing—

(*a*) the attachment, by order of a court, of any payment or part of any payment to which a person is entitled in satisfaction of the judgment of a court or pending the determination of civil proceedings to which he is a party to the extent to which such attachment is permitted by the law with respect to pensions benefits that applies in the case of that person; or

(*b*) the imposition of reasonable restrictions as to the manner in which any payment is to be remitted.

(6) In this section " pensions benefits " has the same meaning as in the preceding section.

CHAPTER IX

THE OMBUDSMAN

Office of Ombudsman.

112.—(1) There shall be an Ombudsman, whose office shall be a public office.

(2) The Ombudsman shall be appointed by the Governor-General, acting after consultation with the Prime Minister, the Leader of the Opposition and such other persons, if any, as appear to the Governor-General, acting in his own deliberate judgment, to be leaders of parties in the House of Representatives.

(3) A person shall not be qualified to be appointed as Ombudsman if he is a member of the House of Representatives, a member of the Senate, a member of any local authority, a candidate for election as a member of the House of Representatives or a local authority nominated as such with his consent or a local government officer.

(4) The Ombudsman shall not perform the functions of any other public office, and shall not, without the approval of the Prime Minister in each particular case, hold any other office of emolument other than the office of Ombudsman or engage in any occupation for reward outside the duties of his office.

(5) Subject to the provisions of the next following subsection, the Ombudsman shall vacate his office—

(*a*) at the expiration of four years from the date of his appointment; or

(*b*) if any circumstances arise that, if he were not the holder of that office, would cause him to be disqualified for appointment as such.

(6) The provisions of subsections (1) to (6) of section 108 of this Constitution shall apply to the office of Ombudsman as they apply to the office of appointed member of the Judicial and Legal Services Commission; and, except as provided in subsection (2) of that section, the functions of the Governor-General under those subsections shall be exercised by him in relation to the Ombudsman in his own deliberate judgment.

Investigations by Ombudsman.

113.—(1) Subject to the provisions of this section, the Ombudsman may investigate any action taken by any officer or authority to which this section applies in the exercise of administrative functions of that officer or authority, in any case in which—

(*a*) a complaint under this section is made alleging that a person or body of persons has suffered injustice in consequence of that action;

(*b*) he is invited to do so by any Minister or any member of the House of Representatives or the Senate; or

(*c*) he considers it desirable to do so of his own motion.

(2) This section applies to the following officers and authorities—

(*a*) any department of the Government or officer of such a department;

(*b*) the Police Force or any member thereof;

(*c*) the Fiji Prisons Service, Aerodromes Fire Service or any other service maintained and controlled by the Government or any officer or authority of any such service;

(*d*) any authority empowered to determine the person with whom any contract or class of contract is to be entered into by or on behalf of the Government or any such officer or authority;

(*e*) such other officers or authorities as may be prescribed by Parliament:

Provided that it shall not apply in relation to any of the following officers and authorities—

(i) the Governor-General or his personal staff;

(ii) any Commission established by this Constitution or the staff of any such Commission;

(iii) any other person or authority in so far as that person or authority exercises power to make appointments to offices in the public service, disciplinary control over or power to remove persons holding or acting in such offices, power to grant, withhold, reduce in amount or suspend pensions benefits in respect of service as public officers or powers in respect of similar matters affecting public officers;

(iv) the Director of Public Prosecutions or any person acting in accordance with his instructions.

(3) A complaint under this section may be made by any individual, or by any body of persons whether incorporated or not, not being—

(*a*) a department or authority of the Government or any authority or body constituted for purposes of the public service or local government; or

(*b*) any other authority or body whose members are appointed by the Governor-General or by a Minister or whose revenues consist wholly or mainly of moneys provided from public funds:

(4) Where any person by whom a complaint might have been made under the preceding subsection has died or is for any reason unable to act for himself, the complaint may be made by his personal representatives or by a member of his family or other individual suitable to represent him; but except as aforesaid a complaint shall not be entertained unless made by the person aggrieved himself.

(5) The Ombudsman shall not conduct an investigation in respect of any complaint under this section unless the person aggrieved is resident in Fiji (or, if he is dead, was so resident at the time of his death) or the complaint relates to action taken in relation to him while he was present in Fiji or in relation to rights or obligations that accrued or arose in Fiji.

(6) The Ombudsman shall not conduct an investigation under this section in respect of any complaint under this section in so far as it relates to any of the following matters, that is to say—

(*a*) any action in respect of which the person aggrieved has or had a right of appeal, reference or review to or before a tribunal constituted by or under any law in force in Fiji, or

(*b*) any action in respect of which the person aggrieved has or had a remedy by way of proceedings in any court of law:

Provided that—

(i) the Ombudsman may conduct such an investigation notwithstanding that the person aggrieved has or had such a right or remedy if satisfied that in the particular circumstances it is not reasonable to expect him to avail himself or to have availed himself of that right or remedy; and

(ii) nothing in this subsection shall preclude the Ombudsman from conducting any investigation as to whether any of the provisions of Chapter II of this Constitution has been contravened.

(7) The Ombudsman shall not conduct an investigation in respect of any complaint made under this section in respect of any action if he is given notice in writing by the Prime Minister that the action was taken by a Minister or Assistant Minister in person in the exercise of his own deliberate judgment.

(8) The Ombudsman shall not conduct an investigation in respect of any complaint made under this section where it appears to him—

(*a*) that the complaint is merely frivolous or vexatious;

(*b*) that the subject matter of the complaint is trivial;

(*c*) that the person aggrieved has no sufficient interest in the subject matter of the complaint; or

(*d*) that the making of the complaint has, without reasonable cause, been delayed for more than twelve months.

(9) The Ombudsman shall not conduct an investigation under this section in respect of any matter if he is given notice by the Prime Minister that the investigation of that matter would not be in the interests of the security of Fiji.

(10) In this section " action " includes failure to act.

Procedure in respect of investigations.

114.—(1) Where the Ombudsman proposes to conduct an investigation under the preceding section, he shall afford to the principal officer of any department or authority concerned, and to any other person who is alleged to have taken or authorised the action in question, an opportunity to comment on any allegations made to the Ombudsman in respect thereof.

(2) Every such investigation shall be conducted in private but except as provided in this Constitution or as prescribed under section 118 of this Constitution the procedure for conducting an investigation shall be such as the Ombudsman considers appropriate in the circumstances of the case; and without prejudice to the generality of the foregoing provision the Ombudsman may obtain information from such persons and in such manner, and make such enquiries, as he thinks fit, and may determine whether any person may be represented, by a barrister and solicitor or otherwise, in the investigation.

Disclosure of information, etc.

115.—(1) For the purposes of an investigation under section 113 of this Constitution the Ombudsman may require any Minister, officer or member of any department or authority concerned or any other person who in his opinion is able to furnish information or produce documents relevant to the investigation to furnish any such information or produce any such document.

(2) For the purposes of any such investigation the Ombudsman shall have the same powers as the Supreme Court in respect of the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad) and in respect of the production of documents.

(3) No obligation to maintain secrecy or other restriction upon the disclosure of information obtained by or furnished to persons in the public service imposed by any law in force in Fiji or any rule of law shall apply to the disclosure of information for the purposes of any such investigation; and the Crown shall not be entitled in relation to any such investigation to any such privilege in respect of the production of documents or the giving of evidence as is allowed by law in legal proceedings.

(4) No person shall be required or authorised by virtue of this section to furnish any information or answer any question or produce any document relating to proceedings of the Cabinet or any committee thereof; and for the purposes of this subsection a certificate issued by the Secretary to the Cabinet with the approval of the Prime Minister and certifying that any information, question or document so relates shall be conclusive.

(5) The Attorney-General may give notice to the Ombudsman, with respect to any document or information specified in the notice, or any class of documents or information so specified, that in his opinion the disclosure of that document or information, or of documents or information of that class, would be contrary to the public interest in relation to defence, external relations or internal security; and where such a notice is given nothing in this section shall be construed as authorising or requiring the Ombudsman or any member of his staff to communicate to any person for any purpose any document or information specified in the notice, or any document or information of a class so specified.

(6) Subject to subsection (3) of this section, no person shall be compelled for the purposes of an investigation under section 113 of this Constitution to give any evidence or produce any document which he could not be compelled to give or produce in proceedings before the Supreme Court.

Proceedings after investigation.

116. —(1) The provisions of this section shall apply in every case where, after making an investigation, the Ombudsman is of opinion that the action that was the subject matter of investigation was—

(*a*) contrary to law;
(*b*) based wholly or partly on a mistake of law or fact;
(*c*) unreasonably delayed; or
(*d*) otherwise unjust or manifestly unreasonable.

(2) If in any case to which this section applies the Ombudsman; is of opinion—

(*a*) that the matter should be given further consideration;
(*b*) that the omisson should be rectified;
(*c*) that the decision should be cancelled, reversed or veried
(*d*) that any practice on which the act, omission decision or recommendation was based should be altered;
(*e*) that any law on which the act, omission, decision or recommehdation was based should be reconsidered;

(*f*) that reasons should have been given for the decision; or

(*g*) that any other steps should be taken,

the Ombudsman shall report his opinion, and his reasons therefor, to the principal officer of any department or authority concerned, and may make such recommendations as he thinks fit; he may request that officer to notify him, within a specified time, of the steps (if any) that it is proposed to take to give effect to his recommendations; and he shall also send a copy of his report and recommendations to the Prime Minister and to any Minister concerned.

(3) If within a reasonable time after the report is made no action is taken which seems to the Ombudsman to be adequate and appropriate, the Ombudsman, if he thinks fit, after considering the comments (if any) made by or on behalf of any department, authority, body or person affected, may thereafter make such further report on the matter as he thinks fit to the House of Representatives and the Senate.

Discharge of functions of Ombudsman.

117.—(1) In the discharge of his functions, the Ombudsman shall not be subject to the direction or control of any other person or authority and no proceedings of the Ombudsman shall be called in question in any court of law.

(2) In determining whether to initiate, continue or discontinue an investigation under section 113 of this Constitution the Ombudsman shall act in accordance with his own discretion; and any question whether a complaint is duly made for the purposes of that section shall be determined by the Ombudsman.

(3) The Ombudsman shall make an annual report to the Governor-General concerning the discharge of his functions, which shall be laid before the House of Representatives and the Senate.

Supplementary and ancillary provision.

118. Parliament may make, or provide, for the making of provision for such supplementary and ancillary matters as may appear necessary or expedient in consequence of any of the provisions of this Chapter, including (without prejudice to the generality of the foregoing power) provision—

(*a*) for the procedure to be observed by the Ombudsman in performing his functions;

(*b*) for the manner in which complaints under section 113 of this Constitution may be made (which may include provisions permitting such complaints to be transmitted to the Ombudsman through the intermediary of a member of the House of Representatives or the Senate);

(*c*) for the payment of fees in respect of any complaint or investigation;

(*d*) for the powers, protection and privileges of the Ombudsman and his staff or of other persons or authorities with respect to any investigation or report by the Ombudsman, including the privilege of communications to and from the Ombudsman and his staff; and

(*e*) the definition and trial of offences connected with the functions of the Ombudsman and his staff and the imposition of penalties for such offences.

CHAPTER X

FINANCE

Consolidated Fund.

119. All revenues or other moneys raised or received for the purposes of the Government (not being revenues or other moneys that are payable by or under any law into some other fund established for a specific purpose or that may by or under any law be retained by the authority that received them for the purposes of defraying the expenses of that authority) shall be paid into and from one Consolidated Fund.

Withdrawals from Consolidated Fund or other public funds.

120.—(1) No moneys shall be withdrawn from the Consolidated Fund except—

(*a*) to meet expenditure that is charged upon the Fund by this Constitution or by any other law in force in Fiji; or

(*b*) where the issue of those moneys has been authorised by an Appropriation Act, by a supplementary estimate approved by resolution of the House of Representatives or in such manner and subject to such conditions as may be prescribed in pursuance of section 122 of this Constitution.

(2) No moneys shall be withdrawn from any public fund of Fiji other than the Consolidated Fund unless the issue of those moneys has been authorised by or under a law.

(3) No moneys shall be withdrawn from the Consolidated Fund except in the manner prescribed.

(4) The deposit of any moneys forming part of the Consolidated Fund with a bank or with the Crown Agents for Oversea Governments and Administrations or the investment of any such moneys in securities in which, under the law for th time being in force in Fiji, trustees are authorised to invest, or the making of advances to such extent and in such circumstances as may be prescribed shall not be regarded as a withdrawal of those moneys from the Fund for the purposes of this section.

Authorisation of expenditure.

121.—(1) The Minister responsible for finance shall cause to be prepared and laid before the House of Representatives and the Senate before the commencement of each financial year estimates of the revenues and expenditure of Fiji for that year.

(2) The heads of expenditure contained in the estimates for a financial year (other than expenditure charged upon the Consolidated Fund by this Constitution or any other law) shall be included in a bill to be known as an appropriation bill which shall be introduced into the House of Representatives to provide for the issue from the Consolidated Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified in the said bill.

(3) If in any financial year it is found—

(*a*) that the amount appropriated by the Appropriation Act for the purposes included in any head of expenditure is insufficient or that a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Appropriation Act; or

(*b*) that any moneys have been expended on any head of expenditure in excess of the amount appropriated for the purposes included in that head by the Appropriation Act or for a purpose for which no amount has been appropriated by the Appropriation Act,

a supplementary estimate showing the sums required or spent shall be laid before the House of Representatives and a motion or motions seeking approval of such supplementary expenditure shall be introduced into the House.

(4) Where in respect of any financial year any supplementary estimates have been laid before the House in accordance with the provisions of the preceding subsection and approved by resolution of the House, a supplementary Appropriation bill shall, as soon as practicable after the end of that year, be introduced into the House to provide for the appropriation for the purposes in question of the sums included in such estimates that have been expended for that year.

Authorisation of expenditure in advance of appropriation.

122. If the Appropriation Act in respect of any financial year has not come into operation by the beginning of that financial year, the Minister responsible for finance may, to such extent and subject to such conditions as may be prescribed ,authorise the withdrawal of moneys from the Consolidated Fund for the purpose of meeting expenditure necessary to carry on the services of the Government until the expiration of four months from the beginning of that financial year or the coming into operation of the Appropriation Act, whichever is the earlier.

Contingencies Fund.

123.—(1) Parliament may make provision for the establishment of a Contingencies Fund and for authorising the Minister responsible for finance, if satisfied that there has arisen an urgent and unforeseen need for expenditure for which no other provision exists, to make advances from that Fund to meet that need.

(2) Where any advance is made from the Contingencies Fund, a supplementary estimate shall be laid before the House of Representatives, and a motion shall be introduced therein as soon as possible for the purpose of replacing the amount so advanced.

Remuneration of certain officers.

124.—(1) There shall be paid to the holders of the offices to which this section applies such salaries and such allowances as may be prescribed.

(2) The salaries and any allowances payable to the holders of the offices to which this section applies shall be a charge on the Consolidated Fund.

(3) The salary payable to the holder of any office to which this section applies and his terms of office, other than allowances which, under the law for the time being in force relating to pensions, are not taken into account in computing pensions, shall not be altered to his disadvantage after his appointment.

(4) Where a person's salary or terms of office depend upon his option, the salary or terms for which he opts shall, for the urposes of subsection (3) of this section, be deemed to be more advantageous to him than any others for which he might have opted.

(5) This section applies to the offices of Governor-General, any judge of the Supreme Court or the Court of Appeal, member of the Constituency Boundaries Commission, member of the Electoral

Commission, appointed member of the Judicial and Legal Services Commission, member of the Public Service Commission, member of the Police Service Commission, Supervisor of Elections, Director of Public Prosecutions, Ombudsman and Auditor-General.

Public debt.

125.—(1) There shall be charged on the Consolidated Fund all debt charges for which Fiji is liable.

(2) For the purposes of this section debt charges include interest, sinking fund charges, the repayment or amortisation of debt, and all expenditure in connection with the raising of loans on the security of the revenues of Fiji or the Consolidated Fund and the service and redemption of debt thereby created.

Auditor-General.

126.—(1) There shall be an Auditor-General whose office shall be a public office.

(2) The public accounts of Fiji and of all courts of law and all authorities and officers of the Government shall be audited and reported on by the Auditor-General and for that purpose the Auditor-General or any person authorised by him in that behalf shall have access to all records, books, vouchers, documents, cash, stamps, securities, stores or other Government property in the possession of any officer:

Provided that, if it is so prescribed in the case of any body corporate directly established by law, the accounts of that body corporate shall be audited and reported on by such person as may be prescribed.

(3) The Auditor-General shall submit his reports to the Minister responsible for finance, who shall cause them to be laid before each House of Parliament.

(4) In the exercise of his functions under this Constitution the Auditor-General shall not be subject to the direction or control of any other person or authority.

CHAPTER XI

MISCELLANEOUS

Interpretation.

127.—(1) In this Constitution, unless the context otherwise requires—

" the Commonwealth " means Fiji and any country to which section 24 of this Constitution for the time being applies, and includes the dependencies of any such country;

" the Crown " means the Crown in right of Fiji;

" disciplinary law " means a law regulating the discipline of any disciplined force;

" disciplined force " means—

(*a*) a naval, military or air force;
(*b*) the Police Force;
(*c*) the Fiji Prisons Service;
(*d*) a fire or forest guard service established by any law in force in Fiji;

" high judicial office " means the office of judge of a court having unlimited jurisdiction in civil and criminal matters or a court having jurisdiction in appeals from any such court;

" House of Parliament " means the House of Representatives or the Senate, as the context may require;

" Fiji " means the territories which immediately before 10th October 1970 constituted the colony of Fiji and includes any other territories declared by Parliament to form part of Fiji;

" financial year " means the period of twelve months ending on 31st December in any year or such other day as may be prescribed by Parliament;

" the Gazette " means the Fiji Royal Gazette;

" the Government " means Her Majesty's Government of Fiji;

" the Governor-General " means the Governor-General and Commander-in-Chief of Fiji;

" local authority " means the Council of Rotuma,a city council, town council, township board or provincial council and includes any other similar body prescribed by Parliament;

" local government officer " means a person holding or acting in any office of emolument in the service of a local authority but does not include a person holding or acting in the office of a member of any such authority;

" oath " includes affirmation;

" oath of allegiance " means such oath of allegiance as is prescribed in schedule 1 to this Constitution;

" Parliament " means the Parliament established by this Constitution;

" the Police Force " means the Fiji Police Force and includes any other police force established in accordance with such provision as may be prescribed by Parliament;

" prescribed " means prescribed in a law;

Provided that—

(*a*) in relation to anything that may be prescribed only by Parliament, it means prescribed in an Act of Parliament; and

(*b*) in relation to anything that may be prescribed only by some other specified person or authority, it means prescribed in an order made by that other person or authority;

" public office " means, subject to the provisions of the next following section, an office of emolument in the public service;

" public officer " means a person holding or acting in any public office;

" the public service " means the service of the Crown, whether in a civil or military capacity, in respect of the government of Fiji;

" session " means, in relation to Parliament, the sittings of Parliament commencing when it first meets after this Constitution comes into force or after the prorogation or dissolution of Parliament at any time and terminating when Parliament is prorogued or is dissolved without having been prorogued;

" sitting " means, in relation to a House of Parliament, a period during which the House is sitting continuously without adjournment, and includes any period during which the House is in committee;

" the Speaker " means the Speaker of the House of Representatives;

" subordinate court " means any court of law established for Fiji other than the Supreme Court, the Court of Appeal or a court established by a disciplinary law.

(2) Save as otherwise provided in this Constitution, the Interpretation Act 1889(a) shall apply, with the necessary adaptations, for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and in relation to Acts of the Parliament of the United Kingdom.

References to public office, etc.

128.—(1) In this Constitution the expression " public office " shall be construed—

(*a*) as including the office of any judge of the Supreme Court or the Court of Appeal and the office of member of any other court of law in Fiji, unless the context otherwise requires;

(*b*) as not including—

(i) the office of any Minister or Assistant Minister, Leader of the Opposition, Speaker, Deputy Speaker or member of the House of Representatives or President, Vice-President or member of the Senate;

(ii) the office of member of any Commission established by this Constitution; or

(iii) except in so far as may be otherwise prescribed, the office of member of any council, board, panel, committee or other similar body (whether incorporated or not) established by or under any law.

(a) 1889 c. 63.

(2) For the purposes of this Constitution a person shall not be considered as holding a public office or a local government office, as the case may be, by reason only that he is in receipt of a pension or other like allowance in respect of service under the Crown or under a local authority.

Appointments to certain offices for terms of years.

129.—(1) It shall be lawful for a suitably qualified person to be appointed to hold any office to which this section applies for such term, not being less than four years and not expiring after the day on which he would attain the retiring age applicable to that office, as may be specfied in the instrument of appointment, and the provisions of this Constitution shall have effect in relation to any person so appointed as if he would attain the retiring age applicable to that office on the day on which the specified term expires.

(2) This section applies to the office of any judge of the Supreme Court, Supervisor of Elections, Director of Public Prosecutions and Auditor-General.

(3) In this section "retiring age" means, in relation to any office, the age upon the attainment of which a person holding that office is required by the provisions of this Constitution to vacate that office.

Powers of appointment and acting appointments.

130.—(1) Any reference in this Constitution to power to make appointments to any public office shall be construed as including a reference to power to make appointments on promotion and transfer to that office and to power to appoint a person to act in that office during any period during which it is vacant or the holder thereof is unable to perform the functions of that office.

(2) In this Constitution, unless the context otherwise requires, a reference to the holder of an office by the term designating his office shall be construed as including a reference to any person for the time being lawfully acting in or performing the functions of that office.

(3) Where power is vested by this Constitution in any person or authority to appoint any person to act in or perform the functions of any office if the holder thereof is himself unable to perform those functions, no such appointment shall be called in question on the ground that the holder of the office was not unable to perform hose functions.

Reappointments and concurrent appointments.

131.—(1) Where any person has vacated any office established by this Constitution, he may, if qualified, again be appointed or elected to hold that office in accordance with the provisions of this Constitution.

(2) Where a power is conferred by this Constitution upon any person to make an appointment to any office, a person may be appointed to that office, notwithstanding that some other person may be holding that office, when that other person is on leave of absence pending the relinquishment of the office; and where two or more persons are holding the same office by reason of an appointment made in pursuance of this subsection, then, for the purposes of any function conferred upon the holder of that office, the person last appointed shall be deemed to be the sole holder of the office.

132.—(1) References in this Constitution to the power to remove a public officer from his office shall be construed as including references to any power conferred by any law to require or permit that officer to retire from the public service and to any power or right to terminate a contract on which a person is employed as a public officer and to determine whether any such contract shall or shall not be renewed: **Removal from office.**

Provided that—

(*a*) nothing in this subsection shall be construed as conferring on any person or authority power to require any judge of the Supreme Court or the Court of Appeal, the Ombudsman, the Supervisor of Elections, the Director of Public Prosecutions or the Auditor-General to retire from the public service; and

(*b*) any power conferred by any law to permit a person to retire from the public service, shall in the case of any officer mentioned in the preceding paragraph or an officer who may be removed from office by some person or authority other than a Commission established by this Constitution, vest in the Commission that, if that officer had retired, would be the appropriate Commission in relation to the pensions benefits of that officer under section 111 (4) of this Constitution.

(2) Any provision in this Constitution that vests in any person or authority power to remove any public officer from his office shall be without prejudice to the power of any person or authority to abolish any office or to any law providing for the compulsory retirement of public officers generally or any class of public officer on attaining an age specified therein.

133. Any person who has been appointed to any office established by this Constitution may resign from that office by writing under his hand addressed to the person or authority by whom he was appointed; and the resignation shall take effect, and the office shall accordingly become vacant— **Resignations.**

(*a*) at such time or on such date (if any) as may be specified in the writing; or

(*b*) when the writing is received by the person or authority to whom it is addressed or by such other person as may be authorised by that person or authority to receive it,

whichever is the later.

134. For the purposes of this Constitution— **Meaning of "Fijian" and "Indian".**

(*a*) a person shall be regarded as a Fijian if, and shall not be so regarded unless, his father or any of his earlier male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of Fiji or any island in Melanesia, Micronesia or Polynesia; and

(*b*) a person shall be regarded as an Indian if, and shall not be so regarded unless, his father or any of his earlier male progenitors in the male line is or was the child of parents both of whom are or were indigenous inhabitants of the sub-continent of India;

Provided that, where the identity of the father of any person cannot be ascertained, the male progenitors of that person may instead be traced through that person's mother.

Performance of functions of Commissions and tribunals.

135.—(1) Any Commission established by this Constitution may by regulations make provision for regulating and facilitating the performance by the Commission of its functions under this Constitution.

(2) Any decision of any such Commission shall require the concurrence of a majority of all the members thereof and, subject as aforesaid, the Commission may act notwithstanding the absence of any member:

Provided that if in any particular case a vote of all the members is taken to decide the question and the votes cast are equally divided the chairman shall have and shall exercise a casting vote.

(3) Subject to the provisions of this section, any such Commission may regulate its own procedure.

(4) In the exercise of its functions under this Constitution, no such Commission shall be subject to the direction or control of any other person or authority, except where otherwise provided by this Constitution.

(5) In addition to the functions conferred upon it by or under this Constitution any such Commission shall have such powers and other functions (if any) as may be prescribed.

(6) The validity of the transaction of business of any such Commission shall not be affected by the fact that some person who was not entitled to do so took part in the proceedings.

(7) The provisions of subsections (1), (2), (3) and (4) of this section shall apply in relation to a tribunal established for the purposes of section 14(4), 16(1), 91(4), 95(5), 108(3) and 109(4) of this Constitution as they apply in relation to a Commission established by this Constitution, and any such tribunal shall have the same powers as the Supreme Court in respect of the attendance and examination of witnesses (including the administration of oaths and the examination of witnesses abroad) and in respect of the production of documents.

Saving for jurisdiction of courts.

136. No provision of this Constitution that any person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court of law from exercising jurisdiction in relation to any question whether that person or authority has performed those functions in accordance with this Constitution or any other law or should not perform those functions.

Power to amend and revoke instruments, etc.

137. Where any power is conferred by this Constitution to make any proclamation, order, regulation or rule, or to give any direction, the power shall be construed as including the power, exercisable in like manner, to amend or revoke any such proclamation, order, regulation, rule or direction.

Consultation.

138. Where any person or authority other than the Governor-General is directed by this Constitution to exercise any function after consultation with any other person or authority, that person or authority shall not be obliged to exercise that function in accordance with the advice of that other person or authority.

SCHEDULE I TO THE CONSTITUTION

Sections 29, 81, 92, 96 and 127(1).

OATHS AND AFFIRMATIONS

Oath or affirmation of allegiance

I, do swear [or solemnly affirm] that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth II, Her Heirs and Successors, according to law. So help me God. [To be omitted in affirmation.]

Oath or Affirmation for the due execution of the office of Governor-General

I, , do swear [or solemnly affirm] that I will well and truly serve Her Majesty Queen Elizabeth II, Her Heirs and Successors, in the office of Governor-General.

So help me God. [To be omitted in affirmation.]

Oath or Affirmation for the due execution of the office of Prime Minister, Attorney-General, or other Minister or Assistant Minister

I, , being appointed Prime Minister/Attorney-General/Minister/Assistant Minister, do swear [or solemnly affirm] that I will to the best of my judgment, at all times when so required, freely give my counsel and advice to the Governor-General (or any other person for the time being lawfully performing the functions of that office) for the good management of the public affairs of Fiji, and I do further swear [or solemnly affirm] that I will not on any account, at any time whatsoever, disclose the counsel, advice, opinion or vote of any particular Minister or Assistant Minister and that I will not, except with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Fiji, directly or indirectly reveal the business or proceedings of the Cabinet or the nature or contents of any documents communicated to me as the Prime Minister/Attorney-General/Minister/Assistant Minister or any matter coming to my knowledge in my capacity as such and that in all things I will be a true and faithful Prime Minister/Attorney-General/Minister/Assistant Minister.

So help me God. [To be omitted in affirmation.]

Judicial Oath or Affirmation

I, , do swear [or solemnly affirm] that I will well and truly serve Our Sovereign Lady Queen Elizabeth II, Her Heirs and Successors, in the office of Chief Justice/judge of the Supreme Court/Justice of Appeal, and I will do right to all manner of people after the laws and usages of Fiji without fear or favour, affection or ill will.

So help me God. [To be omitted in affirmation].

Section 94(5).

SCHEDULE 2 TO THE CONSTITUTION

ALTERATIONS TO THE PROVISIONS OF THE CONSTITUTION RELATING TO THE JUDGES OF THE COURT OF APPEAL

PART 1

Provision of the Constitution	*Alteration*
Section 94	The substitution for paragraphs (*b*) and (*c*) of subsection (1) of the following:— "(*b*) two Justices of Appeal or such greater number of Justices of Appeal as may be prescribed by Parliamant: Provided that the office of a Justice of Appeal shall not be abolished while any person is holding that office unless he consents to its abolition." The insertion immediately before subsection (5) of the following new subsection:— "(4B) If the office of any Justice of Appeal is vacant or if a person holding the office of Justice of Appeal is acting as the President of the Court of Appeal or is for any reason unable to perform the functions of his office, the Governor-General, acting after consultation with the Judicial and Legal Services Commission, may appoint a person qualified for appointment to that office to act as a Justice of Appeal; and any person so appointed shall, unless he is removed from office under the next following section, continue to act until his appointment is revoked by the Governor-General acting in accordance with the advice of the President of the Court of Appeal: Provided that a person whose appointment has been revoked may continue to act for so long thereafter as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him previously thereto."

PART 2

Section 94	The substitution for paragraph (*a*) of subsection (1) of the following:— "(*a*) a President of the Court of Appeal; and".

Provision of the Constitution	*Alteration*
	The insertion at the beginning of subsection (2) of the words " The President of the Court of Appeal shall be appointed by the Governor-General acting after consultation with the Prime Minister and the Leader of the Opposition, and ".
	The insertion immediately after subsection (4) of the following new subsection:— " (4A) Whenever the office of President of the Court of Appeal is vacant or the person holding that office is for any reason unable to perform the functions of his office, then until a person has been appointed to and has assumed the functions of that office or until the holder thereof has resumed those functions, as the case may be, those functions shall be performed by such one of the Justices of Appeal or by such other person qualified for appointment to that office as the Governor-General, acting after consultation with the Prime Minister and the Leader of the Opposition, may appoint for that purpose: Provided that a person appointed under this subsection who is not a Justice of Appeal may, notwithstanding the assumption or resumption of the functions of the office of President of the Court of Appeal by the holder of that office, continue to act as a judge of the Court of Appeal for so long thereafter as may be necessary to enable him to deliver judgment or do any other thing in relation to proceedings that were commenced before him previously thereto.
Section 95	In subsections (1), (2), (3), (4), (5) and (6), the substitution of the words " judge of the Court of Appeal " for the words " Justice of Appeal ".
	In subsection (5), the insertion of the words " or, in relation to the removal of the President of the Court of Appeal, the Governor-General " after the words " President of the Court of Appeal ".

Provision of the Constitution	*Alteration*
	In subsection (7), the insertion at the end of the words " in relation to the removal or suspension of a Justice of Appeal and in his own deliberate judgment in relation to the removal or suspension of the President of the Court of Appeal ".
Section 96	The substitution of the words " judge of the Court of Appeal " for the words " Justice of Appeal ".
Section 101(1) ..	The insertion at the end of the following proviso:— " Provided that whenever the Judicial and Legal Services Commission is exercising its functions under subsection (2) or (4B) of section 94 of this Constitution the reference to the Chief Justice in paragraph (*a*) of this subsection shall be construed as if it were a reference to the President of the Court of Appeal ."
Schedule 1	In the Judicial Oath or Affirmation, the insertion of " /President of the Court of Appeal " immediately after the word " Court ".

SCHEDULE 3 TO THE CONSTITUTION

OFFICES TO WHICH SECTION 102 APPLIES

Central Agricultural Tribunal.
Chief Registrar of the Supreme Court.
Deputy Registrar of the Supreme Court.
Assistant Registrar of the Supreme Court.
Solicitor-General.
Crown Solicitor.
Chief Legal Draftsman.
Principal Legal Draftsman.
Senior Legal Draftsman.
Senior Magistrate.
First Class Magistrate.
Second Class Magistrate.
Third Class Magistrate.
Principal Legal Officer.
Senior Legal Officer.
Legal Officer.

[LEGAL NOTICE NO. 111]

The Fiji (Procedure in Appeals to Privy Council) Order 1970

Made - - - - 30*th September* 1970
Coming into Operation 10*th October* 1970

At the Court at Balmoral, the 30th day of September 1970

Present,

The Queen's Most Excellent Majesty in Council

Her Majesty, by virtue and in the exercise of the powers in that behalf by section 1 of the Judicial Committee Act 1844(**a**) or otherwise in Her Majesty vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:—

Citation and commencement.

1. This Order may be cited as the Fiji (Procedure in Appeals to Privy Council) Order 1970 and shall come into operation on the appointed day.

Interpretation.

2.—(1) In this Order, unless the context otherwise requires—

" appeal " means appeal from a decision of the Court to Her Majesty in Council;

" the appointed day " means the 10th October 1970;

" Court " means the Court of Appeal of Fiji;

" decision " means a decision in any proceedings originating in Fiji and includes any such decision given before the appointed day;

" record " means the aggregate of papers relating to an appeal (including pleadings, proceedings, evidence and decisions) proper to be laid before Her Majesty in Council on the hearing of an appeal;

" Registrar " means the Registrar of the Court or other proper officer having custody of the records of the Court.

(2) The Interpretation Act 1889(**b**) shall apply, with the necessary adaptations, for the purpose of interpreting this Order and otherwise in relation thereto as it applies for the purposes of interpreting, and in relation to, Acts of Parliament.

Applications for leave to appeal.

3. Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days of the date of the decision to be appealed from, and the applicant shall give all other parties concerned notice of his intended application.

Conditional leave to appeal.

4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only—

(*a*) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum not exceeding 1,000 dollars for the due

(**a**) 1844 c. 69. (**b**) 1889 c. 63.

prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of the Judicial Committee ordering the appellant to pay the costs of the appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the appellant shall take the necessary steps for the purposes of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

Powers of a single judge.

5. A single judge of the Court shall have power and jurisdiction—

(*a*) to determine any application to the Court for leave to appeal in any case where under any provision of law an appeal lies as of right from a decision of the Court;

(*b*) generally in respect of any appeal pending before Her Majesty in Council, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:

Provided that any order, directions or decisions made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decision.

Stay of execution.

6. Where the decision appealed from requires the appellant to pay money or do any act, the Court shall have power, when granting leave to appeal, either to direct that the said decision shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court shall seem just, and in case the Court shall direct the said decision to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security to the satisfaction of the Court for the due performance of such Order as Her Majesty in Council shall think fit to make thereon.

Manner of providing security.

7. For the purposes of sections 4 and 6 of this Order, a person may provide security in any manner that the Court may approve in his case, and for the avoidance of doubts it is declared that such security may with the approval of the Court consist in whole or in part of a deposit of money.

Preparation of record.

8.—(1) The preparation of the record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

(2) The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the record all documents (more particularly such as are merely formal) that are not relevant to the subject matter of the appeal and, generally, to reduce the bulk of the record as far as practicable, taking special care to avoid the

duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the record.

(3) Where in the course of the preparation of a record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant and the other party nevertheless insists upon its being included, the record, as finally printed (whether in Fiji or in England) shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers or otherwise the fact that, and the party by whom, the inclusion of the documents was objected to.

(4) The reasons given by judges of the Court for or against any decision pronounced in the course of the proceedings out of which the appeal arises shall be communicated by them in writing to the Registrar, and shall be included in the record.

Printing of the record.

9.—(1) The record may be printed in Fiji or may be printed in England if the parties agree to its being printed, but in the absence of such agreement shall be duplicated by process approved by the Registrar of the Privy Council. If the record is to be printed it shall be printed in accordance with the Rules set forth in the Schedule to this Order.

(2) Where the record is printed in Fiji the Registrar shall, at the expense of the appellant, transmit to the Registrar of the Privy Council forty copies of such record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal of the Court.

(3) Where the record is to be printed or duplicated in England, the Registrar shall, at the expense of the appellant, transmit to the Registrar of the Privy Council one certified copy of such record, together with an index of all the papers and exhibits in the case. No other certified copies of the record shall be transmitted to the agents in England by or on behalf of the parties to the appeal.

(4) Where part of the record is printed in Fiji and part is to be printed or duplicated in England, subsections (2) and (3) of this section shall, as far as possible, apply to such parts as are printed in Fiji and such as are to be printed or duplicated in England respectively.

Consolidation of appeals.

10. Where there are two or more applications for leave to appeal arising out of the same matter, and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the appeals should be consolidated, the Court may direct the appeals to be consolidated and grant leave to appeal by a single order.

Failure to prosecute appeal.

11. Where an appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the respondent, rescind the order granting conditional leave to appeal notwithstanding the appellant's compliance with the conditions imposed by such an order, and may give such directions

as to the costs of the appeal and security entered into by the appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

Notice to other parties.

12.—(1) On an application for final leave to appeal, the Court may enquire whether notice or sufficient notice of the application has been given by the appellant to parties concerned and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal, or may give such other directions in the matter as, in the opinion of the Court, the justice of the case requires.

(2) The Registrar shall, with all convenient speed, transmit to the Registrar of the Privy Council a certificate to the effect that the respondent has received notice, or is otherwise aware, of the order of the Court granting final leave to appeal and of the transmission of the record to England.

Prosecution of appeal.

13. An appellant who has obtained final leave to appeal shall prosecute his appeal in accordance with the Rules for the time being regulating the general practice and procedure in appeals to Her Majesty in Council.

Withdrawal of appeal.

14.—(1) An appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal withdraw his appeal on such terms as to costs and otherwise as the Court may direct.

(2) Where an appellant, having obtained final leave to appeal, desires, prior to the despatch of the record to England, to withdraw his appeal, the Court may, upon an application in that behalf made by the appellant, grant him a certificate to the effect that the appeal has been withdrawn, and the appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express order of her Majesty in Council, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the Court may think fit to direct.

Dismissal for non-prosecution.

15. Where an appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England, any respondent may, after giving the appellant due notice of his intended application, apply to the Court for a certificate that the appeal has not been effectually prosecuted by the appellant, and if the Court sees fit to grant such a certificate the appeal shall be deemed, as from the date of such certificate, to stand dismissed for non-prosecution without express Order of Her Majesty in Council, and the costs of the appeal and the security entered into by the appellant shall be dealt with in such manner as the Court may think fit to direct.

Substituting parties.

16.—(1) Where at any time between the order granting final leave to appeal and the despatch of the record to England, the record becomes defective by reason of the death or change of status of a party to the appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing

who, in the opinion of the Court, is the proper person to be substituted or entered on the record in place of or in addition to the party who has died or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the record as aforesaid without express Order of Her Majesty in Council.

(2) Where the record subsequently to its despatch to England becomes defective by reason of the death or change of status of a party to the appeal, the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered on the record, in place of, or in addition to, the party who has died or undergone a change of status.

Printing of case.

17. The case of each party to the appeal may be printed in Fiji or printed or duplicated in England and shall, if it is to be printed, be printed in accordance with the Rules set forth in the Schedule to this Order; and it shall be signed by at least one of the counsel who attends at the hearing of the appeal, or by the party himself if he conducts his appeal in person.

Form of case.

18. The case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the appeal arises, the contentions to be urged by the party lodging the case and the reasons of appeal. Reference by page and line to the relevant portions of the record as printed shall, as far as practicable, be printed in the margin, and care should be taken to avoid, as far as possible, the reprinting in the case of long extracts from the record. The taxing officer, in taxing the costs of the appeal, shall, either of his own motion or at the instance of any party, inquire into any unnecessary prolixity in the case and shall disallow the costs occasioned thereby.

Costs in Fiji.

19. Where the Judicial Committee directs a party to bear the costs of an appeal incurred in Fiji, such costs shall be taxed by the proper officer of the Court in accordance with the rules for the time being regulating taxation in the Court.

Enforcing Order.

20. Any Order made by Her Majesty in Council on an appeal from a decision of the Court may be enforced in like manner as any decision of the Court should or might have been executed.

Revocation.

21.—(1) The Order in Council dated 31st May 1910 regulating appeals from the Supreme Court of Fiji to Her Majesty in Council (a) and the Fiji (Appeal to Privy Council) Order in Council 1950(b) are revoked.

(2) Anything done under any provision of the Orders revoked by the preceding subsection corresponding to a provision of this Order shall have effect on and after the appointed day as if it had been done under that provision of this Order.

W. G. Agnew

(a) Rev. XI, p. 363. (b) 1950 II, p. 1555.

THE SCHEDULE

Sections 9(1) and 17.

I. Records and cases in appeals to Her Majesty in Council shall be printed in the form known as demy quarto.

II. The size of the paper used shall be such that the sheet, when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be pica type, but long primer shall be used in printing accounts, tabular matter and notes.

IV. The number of lines on each page of pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

EXPLANATORY NOTE

(*This Note is not part of the Order.*)

This Order makes provision for the procedure in appeals to Her Majesty in Council from decisions of the Court of Appeal of Fiji.

S.I. 1970 No. 1433.